Administrative Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Pitman and Commissioner of Taxation (Taxation) [2020] AATA 5308 (21 December 2020)

Division: **TAXATION AND COMMERCIAL DIVISION**

File Numbers: **2020/5086; 2020/5087; 2020/5088**

Re: **Debbie Pitman**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President S A Forgie**

Date of decision: **21 December 2020**

Place: **Melbourne**

The Tribunal decides that:

1. the applicant is not a person who has standing to apply for an extension of time within which to lodge an application for review of a reviewable objection decision made by a delegate of the respondent on 31 October 2016; and
2. the applicant's application for an extension of time within which to lodge an application for review of the reviewable objection decision made by a delegate of the respondent on 31 October 2016 is dismissed.

[sgd]

Deputy President S A Forgie

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Catchwords
TAXATION *– whether bankrupt person charged with criminal offences relating to a tax debt may apply to the Tribunal for an extension of time within which to lodge an application for review of a reviewable objection decision – whether dissatisfied with reviewable objection decision – no standing to make an application.*

Legislation
Acts Interpretation Act 1901; ss 29 and 33(2A)
Administrative Appeals Tribunal Act 1975; ss 25(6), 29(1)-(8), 42A, 42B, 43 and 69BA
Bankruptcy Act 1966; ss 5, 55(3AB), 55(4), 60, 74(1), 77, 153A(1),153B, 139ZG and Schedule 2: ss 90-15 and 90-20
Crimes Act 1958 (Vic); ss 81, 82, 320, 321(2) and (3), 321B and 321D
Income Tax Assessment Act 1997; s 995-1
Insolvency Law Reform Act 2016 s 3; Schedule 1; Item 54
Taxation Administration Act 1953; ss 2(1), 14ZZ, 14ZZC, 14ZZK, 14ZZL, 14ZZM, 14ZZQ and 77 Schedule 1: ss 153, 155-10(1), 155-35, 255-5, 255-10, 255-110 and 350-10

Insolvency Law Reform (Transitional Provisions) Regulation 2016; r 5(2)(p)

Cases
Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board [2007] HCA 23; (2007) 231 CLR 350; 234 ALR 618; 81 ALJR 1155; 95 ALD 220
Allan v Transurban City Link Ltd [2001] HCA 58; 208 CLR 167; 75 ALJR 1551; 183 ALR 380
Baker v Sheridan & Anor [2005] NSWCA 408
Baulkham Hills Shire Council v Stankovic [2009] NSWCA 281
Bourne v Norwich Crematorium Ltd: [1967] 1 WLR 691; 2 All ER 576
Case 2/94 (1994) 94 ATC 106
Case X18 (1990) 90 ATC 219
Cheney v Spooner (1929) 41 CLR 532; [1929] ALR 173; (1929) 3 ALJR 30
Cummings v Petroleum NL [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616
Delph Sing v Wood [1918] HCA 69; (1918) 25 CLR 497
Deputy Commissioner of Taxation v Murray and *Deputy Commissioner of Taxation v Pitman* [2017] VSC 785
Director-General of Social Services v Thomson [1981] FCA 209; (1981) 38 ALR 624; 53 FLR 356
Dudley (Lord) v Dudley (Lady) (1705) Prec. Ch. 241
Federal Commissioner of Taxation v Bosanac [2016] FCA 448; (2016) 103 ATR 51
Federal Commissioner of Taxation v Official Receiver (1956) 95 CLR 300; [1956] ALR 643; (1956) 30 ALJR 143
Fuller v Beach Petroleum NL [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235
Griffiths v Civil Aviation Safety Authority [1996] FCA 1502; 67 FCR 301; 137 ALR 521; 41 ALD 50
Heath v Tang [1993] 1 WLR 1421; [1993] 4 All ER 694
Heinrich v Commonwealth Bank of Australia [2003] FCAFC 315
Lofthouse (In the matter of Guss) [2001] FCA 25; (2001) 107 FCR 151
McAuliffe v Secretary, Department of Social Security [1991] FCA 268; 13 AAR 462; 23 ALD 284
McCallum v Commissioner of Taxation (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256
McKellar v Container Terminal Management Services Ltd (No 4) [2002] FCA 185
McMahon v Block [2010] FCA 947
Owens v Comlaw [2006] VSCA 151; (2006) 201 FLR 275
R v Salvo [1979] VicRp 39; [1980] VR 401
Randall v Deputy Commissioner of Taxation [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41
Re A and Commissioner of Taxation (1997) 46 ALD 715

Re Cook and Secretary, Department of Employment and Workplace Relations [2007] AATA 1690
Re Hawkins; Ex parte Official Receiver (1892) 1 QB 890
Re Robson and Secretary, Department of Social Security [1992] AATA 157
Re Rouf and Secretary, Department of Family and Community Services [2004] AATA 838; (2004) 83 ALD 357
Re Singh and Secretary, Department of Education, Employment and Workplace Relations [2010] AATA 720
Re Te Velde and Director-General of Social Services [1981] AATA 87; (1981) 3 ALN N111
Re Vassal Pty Ltd [1983] 2 Qd R 769
Re Waller and Secretary, Department of Social Security (1985) 8 ALD 26
Re Williams (1968) 13 FLR 10
Robertson v Deputy Commissioner of Taxation [2003] FCA 944; (2003) 2003 ATC 4878
Secretary, Department of Employment and Workplace Relations v Joss [2006] FCA 884; (2006) 152 FCR 541; 92 ALD 60
Secretary, Department of Social Security v Southcott [1998] FCA 323; (1998) 82 FCR 100; 50 ALD 162
Spirakos v Deputy Federal Commissioner of Taxation [2005] FCA 1068; (2005) 2005 ATC 4826
Taylor v Secretary to the Department of Social Security (1988) 18 FCR 322; 79 ALR 327; 14 ALD 655
Transurban City Link Ltd v Allan [1999] FCA 1723; (1999) 95 FCR 553; 168 ALR 687; 57 ALD 583; 105 LGERA 427; 30 AAR 304

Secondary Materials
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The Macquarie Dictionary, 2nd edition, 1991

REASONS FOR DECISION

Deputy President S A Forgie

1. Ms Pitman lodged an application for review of an objection decision made by a delegate of the Commissioner of Taxation (Commissioner) on 31 October 2016. She did so on 21 August 2020. On the same day, she lodged an application under s 29 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) for an extension of time within which to lodge her application. On the material that I have been given, I accept that Ms Pitman was, at the time of lodgement and continuing, an undischarged bankrupt and that, since bankruptcy, she has been charged with four offences. Three of those charges relate to obtaining financial advantage from the Australian Taxation Office (ATO) by deception and the fourth to conspiracy with another to cheat and defraud the ATO of her liability for an income tax debt by

deception. Ms Pitman's application to the Tribunal for an extension of time has been listed to consider whether the Tribunal has power to consider Ms Pitman's application and so whether she has standing to make that application as she is bankrupt. It was not listed to hear her application for an extension of time but, if she does not have standing, it would follow that the Tribunal would not extend the time for lodgement of her application. Ms Pitman has not chosen to lodge any evidence, whether by her own statement or otherwise, to support either her application for an extension of time or her contention that she has standing.

2. In support of Ms Pitman's application, Dr Orow of counsel conceded that, ordinarily, she would not be a person who is "*dissatisfied*" with an objection decision within the meaning of s 14ZZ(1)(a) of the TA Act. Relying on the view of Whitlam and Lehane JJ in *McCallum v Federal Commissioner of Taxation*[1] (*McCallum*), he submitted, however, that Ms Pitman is a person who is dissatisfied with the Commissioner's reviewable objection decision as the objection decision would have consequences that transcend the discharge from her bankruptcy. The majority in *McCallum* had contemplated that, if a bankrupt could establish that, he or she could have standing. Dr Orow submitted that Ms Pitman is such a person. All four charges relate to amounts claimed in assessments that are subject to review. If there were, in fact, no tax debt, then Ms Pitman could not have obtained a financial advantage by deception or otherwise.

3. A submission to that effect, Dr Orow stated, could be made at Ms Pitman's committal on the four charges or, alternatively, at the close of the prosecution's case at any trial when arguing that she had no case to answer. Alternatively, if the review of the Commissioner's objection decision were successful, that would be evidence raising a reasonable doubt as to her state of mind at the time of her conduct that forms the basis of the four charges. Even if the tax debt existed at the time of her alleged conduct, the prosecution is required to prove that she acted dishonestly. Her ability to put before the jury evidence that the tax debt was subsequently overturned is reasonably capable of raising a reasonable doubt as to her intention to evade the debt dishonestly. If dishonesty cannot be proved in the criminal proceedings, Ms Pitman is entitled to be acquitted of the offences charged.

4. The trustee of Ms Pitman's bankrupt estate neither consents nor opposes her lodging an objection to the income tax assessments issued by the ATO. He stated

[1] [1997] FCA 533; (1997) 75 FCR 458; 45 ALR 446; (1997) 36 ATR 256; Whitlam and Lehane JJ; Hill J dissenting

this in a letter dated 10 August 2020 and I take his position to be that he neither consents to, nor opposes, her seeking review of the objection decisions made by the Commissioner in relation to those assessments.

5. On behalf of the Commissioner, Ms Horan submitted that he neither endorsed nor opposed Ms Pitman's submission. Ms Pitman's standing and its jurisdiction are matters of which it must satisfy itself. Ms Horan drew my attention to three matters in particular but also noted that the Commissioner did not seek to make any submissions on whether the review of the Commissioner's objection decision would have any bearing on the criminal charges.

6. The first of the other matters was that, upon becoming a bankrupt, Ms Pitman was no longer liable for her taxation debts and the right to seek review of the objection decision fell to her trustee in bankruptcy. Second, if her trustee elected not to do so, she could have sought an order under ss 90-15 and 90-20 of the *Insolvency Practice Schedule (Bankruptcy)* (IP Schedule) in Schedule 2 to the *Bankruptcy Act 1966* (Bankruptcy Act). Ms Horan referred to the case of *Federal Commissioner of Taxation v Bosanac*[2] (*Bosanac*), in which McKerracher J said that "*… the contestability of an assessment remains open to a trustee of a bankrupt and where the trustee elects not to contest an assessment it is open for the Court to grant a bankrupt relief and to intervene in some fashion.*"[3] That is not the factual position in this case, Ms Horan submitted. Finally, the Commissioner did not know whether review of his objection decision by the Tribunal would have any bearing on the criminal charges that Ms Pitman is facing.

7. I have decided that Ms Pitman is not a person who is, within the meaning of s 14ZZ(1)(a) of the TA Act, a person who is "*dissatisfied*" with the Commissioner's objection decision. Therefore, she is not entitled to make an application to the Tribunal for review of that objection decision. As she is not entitled to do that, she is not entitled to make an application to extend the time within which to make an application for its review. I have dismissed her application for an extension of time under s 42B(1)(a) of the AAT Act on the basis that it is misconceived in that she does not have standing to make an application.

CHRONOLOGY OF EVENTS

[2] [2016] FCA 448; (2016) 103 ATR 51

[3] [2016] FCA 448; (2016) 103 ATR 51 at [78]; 69

8. In the Further Submissions for the Applicant dated 30 November 2020, Mr Dunn QC and Dr Gumbleton of counsel set out the context in which the charges had been brought:

> "*a. On 7 August 2014, the Applicant was served with the amended assessments by the Respondent in the amount of $1,476,901.71.*
>
> *b. On 29 January 2015, the Respondent filed a Writ and Statement of Claim against the Applicant in the Supreme Court of Victoria.*
>
> *c. on 6 February 2015, the Applicant lodged her objections to the amended assessments.*
>
> *d. On 31 October 2016, the Respondent disallowed the Applicant's objections.*
>
> *e. On 21 December 2017, a final order was made against the Applicant by the Supreme Court of Victoria in the amount of $2,057,798.53 (the tax debt).*
>
> *f. In January 2018, the Applicant filed for bankruptcy.*
>
> *g. In April 2018, the Applicant was declared bankrupt*."

9. Other than the matter of Ms Pitman's filing for bankruptcy, which is not a fact within his own knowledge, the Commissioner confirmed each of these facts. On his behalf, Ms Horan drew my attention to the cases of *Deputy Commissioner of Taxation v Murray* and *Deputy Commissioner of Taxation v Pitman*,[4] which set out the relevant amounts in the Commissioner's amended assessments. They included income tax and Medicare levy for the 2011, 2012 and 2013 years of income as well as General Interest Charge (GIC) on the unpaid taxation liabilities. Also included were administrative penalties assessed in relation to each of those years together with a further amount of Shortfall Interest Charge (SIC). GIC continued to accrue on the amounts assessed so long as they remained unpaid.

THE CHARGES

Obtain financial advantage by deception

10. Four charges have been brought against Ms Pitman on 29 October 2019. The first three charges relate to offences under s 82(1) of the *Crimes Act 1958* (Vic) (Crimes Act), which provides:

> "*A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).*"

[4] [2017] VSC 785 at [36]; 42(b)] and [48]; Derham AsJ

11. When the word "*deception*" is used in s 82(1), it has the same meaning as in s 81.[5] Section 81 is concerned with obtaining property by deception. Section 81(1) provides:

> "*A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).*"

Section 81(4) provides:

> "*For the purposes of this section, deception—*
>
> *(a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person; and*
>
> *(b) includes an act or thing done or omitted to be done with the intention of causing—*
>
> *(i) a computer system; or*
>
> *(ii) a machine that is designed to operate by means of payment or identification— to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.*"

12. Mr Dunn drew my attention to the case of *R v Salvo*[6] (*Salvo*) to support his submission that the Crown must prove that the accused had a guilty mind. That is a subjective, and not an objective, test. In *Salvo*, Mr Salvo had been charged under s 81(1) with having dishonestly obtained a motor vehicle from its owner, Mr Kapaufs, with the intent to deprive Mr Kapaufs of that motor vehicle by deception. The deception took the form of false representations that Mr Salvo would pay Mr Kapaufs the sum of $3,800 for the motor vehicle and that he would do so by means of a cheque that would be met upon presentation.

13. The trial Judge directed the jury to look to the actual deception of handing over a cheque that was not met when Mr Kapaufs presented it. He directed the jury to consider whether Mr Salvo knew that he had no right to do that. On appeal, Murphy J said that, in the circumstances of the case, it had been misleading to do so. He continued:

> " *In many cases, the actual deception practised will be most relevant to consider when considering the element of 'dishonestly'.*

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[5] Crimes Act; s 82(2) Section 81(1) provides:

[6] [1979] VicRp 39; [1980] VR 401; Murphy and Fullagar JJ; McInerney J

> *But in a case such as the present, it most certainly is not. The issue here is: 'Was the obtaining by the admitted deception done by the accused believing that in the circumstances he had a legal right to obtain the care from Kapaufs.*
>
> *If the jury entertained reasonable doubt whether the accused had such a belief, then the accused was, in my opinion, entitled to be acquitted.*"[7]

14. The word the majority considered the word "*dishonestly*" in s 81(1). Murphy J said:

> " *I agree with Fullagar J that s. 81(1) contemplates that not all obtainings by deception are as such dishonest. In other words, the word 'dishonestly' in s 81(1) is not merely descriptive of the phrase 'by any deception … obtains'. The word 'dishonestly' imports an additional element into the offence. It must be proven that the accused* was not acting honestly *but was* acting dishonestly *when he 'by any deception … obtains property belonging to another'.*
>
> *The very deception practised may, in all the circumstances, demonstrate the accused's dishonesty, that is, show that he makes no claim of right. But, where, as here, an explanation is advanced to explain the reason for practising the deception (which is itself frankly admitted), the only real issue in the case would seem to be the accused's state of mind when obtaining the car from Kapaufs by means of the deception.*"[8]

15. His Honour concluded:

> " *I agree with Fullagar, J. to the effect that if, in the present case, the jury were left in doubt whether the accused himself in fact believed that he had a legal right in the circumstances to obtain the car from Kapaufs, intending to deprive Kapaufs permanently of it, the element in the crime charged designated by the word 'dishonestly' has not been established, and the accused should be acquitted.*"[9]

16. Fullagar J observed:

> " *The fact that the section contemplates that an obtaining by deception, with the intent permanently to deprive, may be done or achieved otherwise than dishonestly, seems to me to cry out for resort to or at least the dictionary in order to gain insight as to the connotations if not the meaning of the word 'dishonestly'.*"[10]

17. Having reviewed those meanings and previous authorities together with the context in which the word is used in the Crimes Act, his Honour concluded:

> "*… I have concluded that the element imported by the word 'dishonestly' into the offence created by s. 81(1) is the element that the accused person*

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[7] [1979] VicRp 39; [1980] VR 401 at 421

[8] [1980] VR 401 at 422

[9] [1980] VR 401 at 421 at 423

[10] [1980] VR 401 at 421 at 425

has no belief that he has a legal right to deprive the other of 'the property'. That element the Crown must prove. …"[11]

18. Earlier in his reasons for judgment, Fullagar J had separated the offence created by s 81(1) into its essential elements saying:

> "*… In s. 81(1) there are express separate elements of (a) obtaining property belonging to another, and (b) by deceit, and (c) with intention to deprive. …* [I]*t seems to me that 'dishonestly' must import int the new statutory offences the notion that the actor is conscious that he has no right to deprive the other of that of which the latter is in fact being deprived. The actor must not merely deprive by conscious voluntary act; he must do so without any genuine claim to any right to do the depriving.*"[12]

19. In this case, the three charges laid against Ms Pitman under s 82(1) are:

> (1) "*The accused at Melbourne on 26 March 2018 dishonestly obtained for herself a financial advantage from the Australian Taxation Office by evading a debt of $2,057,798,53 by deception, by submitting false and or misleading information to the Australian Financial Services Authority, in relation to residential properties at … Layfield South and … Cranbourne North namely: (a) Australian Financial Services Authority Statement of Affairs dated 26 March 2018 Part C question 28 – falsely declared that she did not own any real estate. (b) Part C question 33 – falsely declared that she has not sold, transferred or given away any assets worth more than $1000 in the last 5 years. (c) Part C question 34 – falsely declared that she has not contributed or otherwise assisted in the purchase or improvement of any asset valued over $1000 which is held by someone else.*"
>
> (2) "*The accused at Melbourne on 17th June 2015 dishonestly obtained for herself, a financial advantage from the Australian Taxation Office by evading a debt of $2,057,798.53 by deception, concealing her ownership and control of a residential property known as … Lysterfield South, through a company established by an associate.*"
>
> (3) "*The accused at Melbourne on 21st October 2017 dishonestly obtained for herself, a financial advantage from the Australian Taxation Office by evading a debt of $2,057,798.53 by deception, concealing her ownership and control of a residential property known as … Cranbourne North through a company established by an associate.*"

20. Applying the principles developed in *Salvo* in relation to s 81(1) to the offence created by s 82(1) and in the context of the charges laid against Ms Pitman, I have first divided the offence into its separate elements. They are: (1) obtaining a financial advantage (whether for himself or herself or another); and (2) doing so by deception as defined in s 81(4). Unlike s 81(1), s 82(1) does not contain an element of intention. Like s 81(1), s 82(1) requires that the person obtained that

[11] [1980] VR 401 at 421 at 435

[12] [1980] VR 401 at 421 at 426

financial advantage "*dishonestly*". That word means that the offence created by s 82(1) would require the Crown to prove that Ms Pitman had no belief that she had a legal right to obtain that financial advantage.

Conspiracy to cheat and defraud ATO of liability for income tax by deception

21. A further charge was laid under the common law:

> "*The accused in Victoria between 7th August and 3rd April 2018 did conspire with Graham RITCHIE and others to cheat and defraud the Australian Taxation Office of the liability of the accused for an income tax debt by deception, namely by concealing that she had effective control of real estate properties in Victoria and effective control of funds to service the mortgages and car finance payments.*"

22. The Crimes Act recognises it as an offence at common law in s 320 when it prescribes the maximum terms of imprisonment for certain common law offences. Conspiracy to cheat and defraud is named in Column 1 of the Table in s 320 as a common law offence. The abolition of the offence of conspiracy at common law does not affect the offence of conspiracy at common law in so far as it relates to conspiracy to cheat and defraud.[13]

23. Section 321D of the Crimes Act provides:

> "*Sections 321(2) and (3) and 321B shall apply, so far as they are capable of doing so and with such changes as are necessary, for the purpose of determining whether a person is guilty of conspiracy under enactment other than section 321 or of conspiracy to cheat and defraud or of conspiracy to defraud.*"

24. Section 321B is concerned with the consequences of the acquittal of co-conspirators and is of no consequence. Sections 321(1) sets out the circumstances in which a person is guilty of an indictable offence of conspiracy to commit an offence. That is not the offence with which Ms Pitman has been charged. As provided for in s 321D, though, ss 321(2) and (3) are relevant in the context of a charge of conspiracy to cheat and defraud. They provide:

> "***Conspiracy to commit an offence***
>
> *(1) …*
>
> *(2) For a person to be guilty under subsection (1) of conspiracy to commit a particular offence both he and at least one other party to the agreement—*
>
> *(a) must intend that the offence the subject of the agreement be committed; and*

[13] Crimes Act; s 321F(2)

(b) must intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place.

(3) A person may be guilty under subsection (1) of conspiracy to commit an offence notwithstanding the existence of facts of which he is unaware which make commission of the offence by the agreed course of conduct impossible."

TAX ADMINISTRATION ACT AND BANKRUPTCY ACT: Legislative Framework

25. In this section of my reasons, I will summarise the provisions of the *Taxation Administration Act 1953* (TA Act) and of the Bankruptcy Act before turning to the authorities that relate to a bankrupt taxpayer's standing, or entitlement, to make an application for review to the Tribunal in respect of a reviewable objection decision made by the Commissioner. In doing this, I realise that Ms Pitman submits that her circumstances go beyond those authorities. Before I come to her circumstances, though, it seems to me that I must first understand those authorities and the pattern they identify in the interaction between the review rights provided in the TA Act as well as the scheme of management and obligations imposed by the Bankruptcy Act.

Assessment of taxation liability and review

A. Notice of assessment

26. The Commissioner must give a taxpayer notice of an assessment of an assessable amount as soon as practicable after the assessment is made.[14] He may amend that assessment within a period of four years from the day on which he gave notice of the assessment to a taxpayer under s 155-10 of the TA Act or such further period as extended under ss 155-35(3) or (4).[15]

B. Application to the Tribunal for review

27. An enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment or by another enactment having effect under that enactment. The *Taxation Administration Act 1953* (TA Act) is such an enactment. Section 14ZZ(1) provides that, if a person is "*dissatisfied*" with the Commissioner's objection decision that can be characterised as a "*reviewable objection decision*",[16] the person may either apply to the Tribunal for review of the decision or appeal to the Federal Court against the decision.[17] The AAT Act provides for the review of decisions in relation to which an application has been made but its provisions may be added to, excluded or modified by, in this case, the TA Act.[18] Section 14ZZC modifies the operation of ss 29(1) to (6) of the AAT Act in relation to reviewable objection decisions by providing that the AAT Act applies as if they were omitted and replaced with a new s 29(1). In so far as the new s 29(1) is relevant in this case, it provides that an application must be lodged with the Tribunal within 60 days after the person making the application has been served with notice of the reviewable objection decision.[19]

28. Section 29(7) of the AAT Act, which has not been modified by the TA Act, provides, in so far as it is relevant in this case:

> "*The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision … if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.*"

[14] TA Act; Schedule 1, s 155-10(1)

[15] TA Act; Schedule 1, s 155-35

[16] For the purposes of Part IVC, in which s 14ZZ is located, a "*reviewable objection decision*"is an objection decision that is not an ineligible income tax remission decision; TA Act; s 14ZQ. An "*ineligible income tax remission* decision"is defined in s 14S: TA Act; s 2(1). It relates to the remission of additional tax payable by a taxpayer under certain provisions of the *Income Tax Assessment Act 1936*. There is no suggestion in this case that the objection decision in this case is an ineligible income tax remission decision.

[17] TA Act; s 14ZZ(1)(a)

[18] AAT Act; s 25(6)

[19] AAT Act; s 29(d) as provided for in TA Act; s 14ZZC

The time for making an application may be extended under s 29(7) even though the time for doing so has expired.[20]

C. Review by the Tribunal

29. As a general rule, an applicant is limited to the grounds stated in the taxation objection to which his or her application for review relates. The exception to that rule arises if the Tribunal orders that the applicant is permitted to raise another ground or grounds.[21] That means that, unless the Tribunal makes an order permitting new grounds, the applicant is limited to the grounds that he or she raised in the objection to the Commissioner's assessment.

30. Unlike most of the Tribunal's jurisdictions, the applicant has a burden of proof. The burden is that of proving, in the case of an assessment, two issues. One is that the assessment is excessive or otherwise incorrect and the other is what the assessment should have been.[22]

31. Section 43 of the AAT Act relates to the Tribunal's decision on review. It has been modified for the purpose of the review of reviewable objection decisions by the addition of ss 43(2C), (2D) and (2E). They are not relevant in the context of this case. What is relevant are the Tribunals' powers when reviewing a decision. Section 43(1) provides:

> "*For the purposes of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:*
>
> *(a) affirming the decision under review;*
>
> *(b) varying the decision under review; or*
>
> *(c) setting aside the decision under review and:*
>
> *(i) making a decision in substitution for the decision so set aside; or*
>
> *(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.*"

32. Unless the Tribunal specifies a later date in its decision, a decision made under s 43 comes into operation "*forthwith upon the giving of the decision*."[23] The Tribunal's decision then becomes that of the person who made the decision under review. This is the subject of s 43(6), which provides:

> "*A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance*

[20] AAT Act; s 29(8)

[21] TA Act; s 144ZK(a)

[22] TA Act; s 14ZZK(b)(i)

[23] AAT Act; ss 43(5A) and see also s 43(5B) regarding the Tribunal' power to specify in its decision a later date.

with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."

33. When the Tribunal makes a decision on the review of a reviewable objection decision and it becomes final, the Commissioner must take any action that is necessary to give effect to the decision. That action may include amending any assessment or determination concerned. Whatever the action, the Commissioner must take it within 60 days of the decision's becoming final.[24] If no appeal has been lodged against the Tribunal's decision within the period for lodging it, the decision becomes final at the end of that period.[25]

D. Collection and recovery of tax-related liabilities

34. Under s 14ZZM of the TA Act is concerned with the implementation of an assessment made by the Commissioner. It provides:

> "*The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending.*"

Section 14ZZR is enacted in similar terms in relation to appeals to the Federal Court against an objection decision.

35. Part 4-15 of Schedule 1 to the TA Act, which has effect under s 3AA(1), is concerned with the collection and recovery of tax-related liabilities. Its object "*… is to ensure that unpaid amounts of *tax-related liabilities and other related amounts are collected and recovered in a timely manner.*" A "*tax-related liability*" is defined, in so far as it is relevant in this case, as a pecuniary liability to the Commonwealth arising directly under a taxation law.[26] Specific "*tax-related liabilities*" are identified in s 250-10 of Schedule 1 together with the provision specifying when the liability becomes due and payable. They include income tax specified as due and payable under s 5-5 of the *Income Tax Assessment Act 1997* (ITAA97),[27] SIC under s 5-10 of ITAA97[28] and GIC under s 8AAE of the TA Act.[29]

[24] TA Act; s 14ZZL(1)

[25] TA Act; s 14ZZL(2)

[26] TA Act; s 2(1) and see also *Income Tax Assessment Act 1997*; s 995-1: "*A* 'taxation law*'is (a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act; or (b) legislative instruments made under such an Act (including such a part of an Act); or (c) the* Tax Agents Services Act 2009 *or regulations made under that Act.*"

[27] TA Act; Schedule 1; s 250-10(2), Item 37

[28] TA Act; Schedule 1; s 250-10(2), Item 37AA

[29] TA Act; Schedule 1; s 250-10(2), Item 70

36. An amount of a tax-related liability that is due and payable is a debt due to the Commonwealth and payable to the Commissioner.[30] The Commissioner, a second Commissioner or a Deputy Commissioner may sue in his or her official name in a court of competent jurisdiction to recover an amount of a tax-related liability that remains unpaid after it has become due and payable.[31] In any such proceedings, the notice of assessment issued under a taxation law is conclusive evidence that it was properly made and that the amounts and particulars of the assessment are correct.[32]

Bankruptcy

37. At one time, the payment of tax was to have priority in the case of a person's bankruptcy or a corporation's liquidation but, for most purposes, the Commissioner is now in the same position as any other creditor.

A. Becoming a bankrupt on a debtor's petition

38. Part IV of the *Bankruptcy Act 1966* (Bankruptcy Act) is concerned with proceedings in connection with bankruptcy. Division 2 sets out the circumstances in which a creditor may present a creditor's petition to the Court seeking a sequestration order against the estate of a debtor. Division 3 of Part IV sets out how a debtor may present a petition against himself or herself. This is what Ms Pitman did when she "*filed for bankruptcy*".

39. She was entitled to do that under s 55(1), which provides:

> "*Subject to this section, a debtor may present to the Official Receiver a petition against himself or herself.*"

The debtor's petition Ms Pitman presented had to be in accordance with the approved form and accompanied by a statement of her affairs. An "*approved form*" is a document that accords with s 6D.[33] The form marked "*AFSA.F.02.06*" is an approved form for a debtor's petition and that marked "*AFSA.F.02.03*" is that for a statement of affairs to accompany that debtor's petition.[34] Among other information, the statement of affairs required Ms Pitman to set out in detail her assets and liabilities.

40. The information she provided in the statement of affairs was important because, under s 55(3AA):

[30] TA Act; Schedule 1; s 255-5(1)

[31] TA Act; s 255-5(2)

[32] TA Act; Schedule 1; s 350-10(1), Item 2. The only exception arises in proceedings under Part IVC of the TA Act on a review or appeal.

[33] Bankruptcy Act; s 5(1)

[34] Both are reproduced in *McDonald, Henry & Meek, Australian Bankruptcy Law & Practice*; 6th edition, 2008, PP McQuade and MGR Gronow; Thomson Reuters, Sydney

"*The Official Receiver may reject a debtor's petition (the* **current petition***) if:*

(a) it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that, if the debtor did not become a bankrupt, the debtor would be likely (either immediately or within a reasonable time) to be able to pay all the debts specified in the statement of affairs; and

(b) at least one of the following applies:

(i) it appears from the information in the statement of affairs (and any additional information supplied by the debtor) that the debtor is unwilling to pay one or more debts to a particular creditor or creditors, or is unwilling to pay creditors in general;

(ii) before the current petition was presented, the debtor previously became bankrupt on a debtor's petition at least 3 times, or at least once in the period of 5 years before presentation of the current petition."

The Official Receiver is not required to consider whether the discretion to reject a debtor's petition arises in each case.[35] He must accept a debtor's petition unless he rejects it under s 55 or unless he is directed by the Court to do so.[36]

41. Where the Official Receiver accepts a debtor's petition under s 55(4A), he must endorse the petition accordingly. Upon his doing so, the debtor, who presented the petition, becomes bankrupt by force of s 55 and by virtue of having presented the petition.[37] He or she continues to be a bankrupt until either he or she is discharged by force of s 149 or his or her bankruptcy is annulled by force of s 74(1), s 153A(1) or s 153B.[38]

B. Administration of a bankrupt estate

42. Subject to the Bankruptcy Act, the general rule is that the property of the bankrupt that is not after-acquired property,[39] vests immediately in the Official Trustee or, if a registered trustee becomes the trustee of the bankrupt's estate, that trustee.[40] After-acquired property vests in the Official Trustee or in a registered trustee as the case may be as soon as it is acquired by, or devolves on, the bankrupt.[41] Except as provided in the Bankruptcy Act, it is not competent for a creditor to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt. Furthermore, except with the leave of the Court and on such terms as the Court thinks fit, it is not competent for a creditor to commence any

[35] Bankruptcy Act; s 55(3AB)

[36] Bankruptcy Act; s 55(4)

[37] Bankruptcy Act; s 55(4A)

[38] Bankruptcy Act; s 55(8)

[39] Property that is acquired after the date of the bankruptcy and that is divisible among the creditors: Bankruptcy Act; s 58(6)

[40] Bankruptcy Act; s 58(1)(a)

[41] Bankruptcy Act; s 58(1)(b)

legal proceeding in respect of a provable debt or to take any fresh step in such a proceeding. That is the effect of s 58(3) but nothing in s 58 shall be taken to affect the right of a secured creditor to realise or otherwise deal with his or her security.[42]

43. The Court may make an order under s 60 of the Bankruptcy Act to discharge an order made against the person or property of a debtor, against whom a petition has been presented,[43] under any law relating to the imprisonment of fraudulent debtors and, if the debtor is imprisoned, to discharge the debtor out of custody.[44] Section 60 also gives the Court power to:

> "*stay any legal process, whether civil or criminal … against the person or property of the debtor:*
>
> *(i) in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or*
>
> *(ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;*
>
> *…*"[45]

44. A "*provable debt*" is "*… a debt or liability that is, under this Act, provable in bankruptcy.*"[46] Section 82(1) provides:

> "*Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.*"

Some debts are expressly included[47] and others expressly excluded. Among the latter are demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust[48] and penalties or fines imposed by a court.[49]

[42] Bankruptcy Act; s 58(5)

[43] A creditor' petition is presented under Division 2 of Part IV of the Bankruptcy Act. Presentation of the creditor' petition does not mean that the debtor is bankrupt. Bankruptcy only follows if the Court makes a sequestration order under s 52 of the Bankruptcy Act.

[44] Bankruptcy Act, s 60(1)(a). The Court is a court having jurisdiction in bankruptcy under the Bankruptcy Act: s 5(1). Those courts are the Federal Court, the Federal Magistrates Court and, in the circumstances set out in ss 35 and 35A, the Family Court. It is jurisdiction exclusive of all courts other than the High Court under s 75 of the Constitution: s 27.

[45] Bankruptcy Act, s 60(1)(b)

[46] Bankruptcy Act, s 5(1)

[47] Bankruptcy Act, s 82(1A)

[48] Bankruptcy Act, s 82(2)

[49] Bankruptcy Act, s 82(3)

Enactments other than the Bankruptcy Act may also provide that amounts that would otherwise be characterised as debts are not debts. The effect of s 12ZW of the *Student Assistance Act* 1973, for example, is that a student loan agreed to before a student becomes bankrupt is not a provable debt in bankruptcy. A creditor must lodge a proof of debt in accordance with ss 84 or 85 before the debt will be taken to have been proved.[50]

45. Section 60(2) is concerned with a situation in which an action has been commenced by a person, who subsequently becomes bankrupt. It provides:

> "*An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.*"

If the trustee does not make an election within 28 days after being given a notice of the action is served upon him or her by a defendant or other party to the action, he or she is deemed to have abandoned the action.[51]

46. Notwithstanding those provisions, s 60(4) permits a bankrupt to:

> "*… continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:*
>
> *(a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or*
>
> *(b) the death of his or her spouse or de facto partner or a member of his or her family.*"

47. Nothing in the Bankruptcy Act deals expressly with the situation in this case. That is the situation of a bankrupt, who wishes to make an application for review of an administrative decision. I will return to his or her entitlement to do so later in these reasons.

48. Upon becoming a bankrupt, a bankrupt is subject to a number of duties and obligations. Among them are the duties imposed by s 77 relating to the discovery of property and the disclosure of information, books and records regarding his or her examinable affairs.[52]

49. Part VI of the Bankruptcy Act is concerned with the administration of a bankrupt's property. Division 1 of Part VI, for example, is concerned with the proof of debts, Division 2 with their order of payment and Division 3 with the property available for the payment of debts. Division 4 regulates the realisation of property and Division 4A regulates any orders in

[50] Bankruptcy Act, s 83

[51] Bankruptcy Act; s 60(3)

[52] Bankruptcy Act; s 77. In relation to a person, the expression "*examinable affairs*""*…means (a) the person' dealings, transactions, property and affairs; and (b) the financial affairs of an associated entity of the person, in so far as they are, or appear to be, relevant to the person or to any of his or her conduct, dealings, transactions, property and affairs.*" Bankruptcy Act; s 5.

relation to the property of an entity either controlled by a bankrupt or from which the bankrupt derived a benefit. Division 4B of Part VI regulates contributions that must be made by a bankrupt from his or her income to his or her bankrupt estate from his or her income as well as from the realisation of property.

C. Discharge and annulment

50. Subject to certain exceptions, when a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally.[53] Among those exceptions are debts incurred by means of fraud[54] or liability to pay an amount to the trustee under s 139ZG(1).[55]

51. Discharge and annulment of a bankruptcy are the subject of Part VII of the Bankruptcy Act. When a person becomes a bankrupt on the Official Receiver's acceptance of his or her debtor's petition, he or she remains a bankrupt until discharged or his or her bankruptcy is annulled by force of s 74(1), s 153A(1) or s 153B.[56] Section 74(1) is of no relevance in Ms Pitman's circumstances as far as I know them to be. That is because I have no evidence that she has put forward any proposal to her creditors for a composition in satisfaction of her debts or a scheme of arrangement of her affairs let alone that any such proposal has been accepted by special resolution of creditors at a meeting held in accordance with the Insolvency Rules. Section 153A would seem to have no relevance in this case because there is no evidence that the trustee of her bankrupt estate is satisfied that all of her debts have been paid in full. If that were the case, her bankruptcy would be annulled by virtue of s 153A(1).

52. Section 153B provides for annulment by the Court:

> "*(1) If the Court is satisfied that a sequestration order ought not to have been made or, in the case of a debtor's petition, that the petition ought not to have been presented or ought not to have been accepted by the Official Receiver, the Court may make an order annulling the bankruptcy.*
>
> *(2) In the case of a debtor's petition, the order may be made whether or not the bankrupt was insolvent when the petition was presented.*
>
> *(3) …*
>
> *(4) …*"

53. The Court may only exercise the power given to it by s 153B(1) if it is first satisfied that a sequestration order should not have been made or, in the case of a debtor's petition, that it should not have been presented or accepted. If it is so satisfied, the Court must then consider whether it will exercise its discretion to do so. That discretion is signified by the use of the word "*may*" in the context of the provision, which was inserted in the Bankruptcy

[53] Bankruptcy Act; s 153(1)

[54] Bankruptcy Act, s 153(2)(b)

[55] Bankruptcy Act; s 153(2)(c)

[56] See [51]-[55] above

Act after 18 December 1987.[57] This exercise of that discretion was explained by Gibbs J in *Re Williams*[58] in the context of a sequestration order:

> "*… Section 154(1) provides that were the Court is satisfied (inter alia) that a sequestration order ought not to have been made the Court may make an order annulling the bankruptcy. Under this section there are two matters which the Court has to consider, first, whether a sequestration order ought not to have been made, and then, if the Court is satisfied of that, whether in the exercise of the Court's discretion the order should be discharged … If the Court is satisfied that the order ought not to have been made, it is not bound as a matter of course to annul the order, but must consider in the light of all the circumstances of the case whether the order ought to be annulled …*"[59]

54. His Honour also considered the time at which consideration was to be given to the issue of whether the sequestration order ought not to have been made, saying:

> "*… In determining the question whether the sequestration order ought not to have been made, the Court is entitled to consider not only the case as disclosed at the time the order was made, but as it would have been disclosed had all the true facts been before the Court on the making of the order …* "[60]

55. The Full Court of the Federal Court made the same point in considering s 153B in *Heinrich v Commonwealth Bank of Australia*:[61]

> "… *Later evidence of previously unknown facts may disclose matters which show that the sequestration order ought not to have been made. That is, the Court is entitled to consider not only the case as disclosed at the time when the sequestration order was made, but also those facts now known then to have existed. The Court excludes those facts which have occurred since the order was made. Later evidence of previously unknown facts may disclose matters which show that the sequestration order ought not to have been made …*"[62]

56. The point is illustrated by the much earlier case of *Delph Sing v Wood*[63] when it considered s 37(1) of the then *Bankruptcy Act 1898* (NSW), which is enacted in substantively the same terms as s 153B(1). Section 37(1) provided:

> "*Where in the opinion of the Court a sequestration order ought not to have been made, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may on the application of any person interested by order discharge such order.*"

[57] *Acts Interpretation Act 1901*; s 33(2A)

[58] (1968) 13 FLR 10

[59] (1968) 13 FLR 10 at 23 (citations omitted)

[60] (1968) 13 FLR 10 at 23 (citations omitted)

[61] [2003] FCAFC 315; Carr, Finn and Sundberg JJ

[62] [2003] FCAFC 315 at [20]

[63] [1918] HCA 69; (1918) 25 CLR 497; Barton, Gavan Duffy and Rich JJ

57. Mr Wood brought proceedings against Mr Delph Sing in the Supreme Court of New South Wales (Supreme Court) to recover the sum of £375. Mr Delph Sing defended the action but judgment was entered against him. On the basis of the judgment, Mr Wood issued a bankruptcy notice. When Mr Delph Sing failed to comply with that notice, Mr Wood presented a petition for a sequestration order. Mr Wood alleged that Mr Delph Sing had committed an earlier act of bankruptcy when he failed to pay other persons a sum due to them on a final judgment obtained by them from the Supreme Court. The sequestration order was duly made in 1915.

58. In 1917, Mr Delph Sing applied to have the sequestration order discharged on the basis that it should not have been made in the first place. There was no suggestion that Mr Delph Sing had paid the debt. The Registrar in Bankruptcy dismissed his application. Mr Delph Sing's appeal from the dismissal was heard by Street J in the Supreme Court. The High Court dismissed his appeal with Barton J saying that he did not wish to add anything other than that the reasons of Street J satisfied him. Gavan Duffy J thought that the Registrar in Bankruptcy had properly exercised his discretion under s 37(1) but did not wish to lay down any general rule given the peculiarities of the case. Rich J decided:

> "*… There is no suggestion of fraud or collusion, and miscarriage of justice cannot be predicated of the judgment sought to be impeached, obtained as it was in an action where the issue of indebtedness was fought out between the parties before the jury …*"[64]

59. In his judgment, Street J had underlined the two steps required by s 37(1). First, the Court had to consider whether the sequestration order ought not to have been made in the first instance. If the Court decides that it ought not to have been made, it does not follow automatically that the sequestration order will be discharged. What follows is the Court's consideration of whether it will exercise its discretion to discharge it at all. In taking the second step:

> "*… in every case, in considering whether the Court should exercise its discretion, it must take into consideration the whole of the circumstances, including the lapse of time which has taken place before the application for the annulment of the sequestration order.*"[65]

60. His Honour found that, on the true construction of the agreement between Mr Delph Sing and Mr Wood, Mr Delph Sing's obligation to pay had not arisen. It had not arisen because Mr Wood had, contrary to his agreement, failed to renew the promissory note securing the sum together with interest. Their agreement to renew the promissory note had, for all practical purposes, been an agreement to postpone the obligation to pay but only until a

[64] [1918] HCA 69; (1918) 25 CLR 497 at 505
[65] [1918] HCA 69; (1918) 25 CLR 497 at 499

certain company should be in a position to pay Mr Delph Sing what it owed him. If the company were to go into liquidation, the amount owed would immediately become payable to Mr Wood. Mr Wood instituted proceedings to recover what he alleged to be the debt owing to him. Mr Delph Sing did not set up any defence based on the fact that his liability had not arisen and Mr Wood was successful in obtaining judgment against him in the defended proceedings. He gave no reason as to why he had not raised this defence.

61. Mr Wood issued a bankruptcy notice in respect of the judgment debt. Mr Delph Sing's application for renewal of that bankruptcy notice was not proceeded with but Street J regarded it and Mr Delph Sing's supporting affidavit as indicating that he was fully aware of his rights under his agreement with Mr Wood and the violation of his rights. Instead, he allowed a sequestration order to be made without calling the attention of the Court to the facts and their significance when he was well aware of them.

62. Some six months after the sequestration order had been made, the company went into liquidation and the debt became due under the agreement. Street J concluded:

> "*… Wood, if the whole of the facts had been known to the Court, might not have succeeded at the time in establishing a good petitioning creditor's debt entitling him to make his debtor bankrupt, the facts show that the debt, on which his petition is based, ripened some six months afterwards into an actual liability to pay immediately. The bankrupt took no proceedings during those six months, nor for eighteen months afterwards. In those circumstances, seeing that there is now a debt undeniably owing by the bankrupt to Wood, and seeing that, on the bankrupt's own sworn admission as contained in his statement of affairs, he is absolutely insolvent, it seems to me that in the exercise of its discretion the Court should not interfered with the sequestration order that has been made.*"[66]

TA ACT AND BANKRUPTCY ACT: their inter-relationship

63. In the case of *Re Singh and Secretary, Department of Education, Employment and Workplace Relations*[67] (*Singh*), I considered whether Mr Singh could apply to the Tribunal for review of a decision made by the then Social Security Appeals Tribunal affirming a decision by a delegate of the Secretary that he was not entitled to Newstart Allowance. In the course of doing that, I considered the case of *McCallum*, on which Dr Orow of counsel relies, but also looked at other authorities that considered the issue both in the context of applications to the Tribunal for review of other decisions. While my decision regarding whether Ms Pitman's has standing to make an application to the Tribunal must be decided against a background of the AAT Act, the TA Act and the Bankruptcy Act, it is important to understand the principles in the wider context of administrative law and the general law as well as bankruptcy law. Rather than repeat my reasoning at [34] to [107] in *Singh* at this

[66] [1918] HCA 69; (1918) 25 CLR 497 at 501-502
[67] [2010] AATA 720

point in my reasons, I have set it out in Attachment A. With one amendment regarding s 42A in the final paragraph, it is part of my reasons in this case and I will draw on it.

64. As the principles apply in this case, an application to the Tribunal for review of a decision that is on foot at the time of the bankruptcy is a "*legal proceeding*" within the meaning of the Bankruptcy Act. In very general terms, an application will be stayed if there is a connection between the application for review and the subject matter of the application if that subject matter may affect the property divisible among the creditors or the amount of the provable debts. An application for review of a reviewable objection decision has such a connection and it is for the trustee to decide under s 60(2) of the Bankruptcy Act to decide whether to continue it.

65. When a person does not have an existing application for review on the day of his or her bankruptcy, his or her entitlement to do so while a bankrupt depends on whether he or she is a person whom an enactment has specified may make an application to the Tribunal.[68] In the case of s 14ZZ(1)(a) of the TA Act, a person who is "*dissatisfied*" with the Commissioner's objection decision may make an application to the Tribunal. In his judgment in *McCallum*, Whitlam J began by considering what could be accomplished by lodging an objection against an assessment:

> " *An objection decision against an assessment under s 175A of the Assessment Act is designed to procure an amendment effecting a reduction in liability for what, in the case of a bankrupt, is a provable debt. In the usual case, therefore, a bankrupt will be unable to show that he is 'dissatisfied with the Commissioner's objection decision' within the meaning of s 14ZZ of the Administration Act, since he will have been divested of liability for the taxation debt. To adapt the language of Hill J in* CTC Resources NL v Commissioner of Taxation *(1994) 48 FCR 397 at 432, he will not be a person to whom 'the objection decision' is still capable of having legal effect.*"[69]

66. His Honour thought it "*… just conceivable that there may be some other basis upon which the applicant can show that he is relevantly 'dissatisfied'. …*"[70] and pointed to the possibility of personal tax liability in the years following bankruptcy as a tentative example of another basis. That possibility had been put forward by Lehane J in his judgment. He had agreed that a bankrupt would not have standing merely because, for example, a successful challenge to the objection decision might result in a surplus in his or her bankrupt estate or

[68] I note that s 27(1) of the AAT Act provides that "*Where this Act or any other enactment …provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons …whose interests are affected by the decision.*" Care must be taken not to assume that any person "*whose interests are affected by a decision*"may apply for review of any decision in relation to which an application may be made to the Tribunal. Section 25(6) provides that an enactment may add to, exclude or modify the operation of the provisions of a number of sections including s 27. Regard must be had to the wording of the particular enactment making provision for an application to be made to the Tribunal.

[69] (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256 at 470; 457; 266

[70] (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256 at 470; 457; 266

because of any effect the assessments and objections might have on his or her reputation. Lehane J continued:

> "*… It is conceivable, however, that there may be some other footing in which he could claim standing: for example, it may be that an objection decision in relation to a particular assessment will have consequences in relation to tax payable, perhaps in years following discharge from bankruptcy, for which Mr McCallum will be personally liable. Such a possibility was not canvassed in argument, and I express no opinion about it. …*"[71]

67. Ms Pitman does not seek review of the objection decision for any purpose associated with her tax liability in future years. As I understand the submissions made on her behalf, she seeks review in order to change the objection decision and ultimately her tax liability so that she is taken, by operation of s 43(6) of the AAT Act to have had a Nil tax liability from the date of the amended assessments served on her on 7 August 2014. That is a date that precedes all of the dates on which it is alleged she engaged in behaviour leading to the first of the three charges and the date from which she is alleged to have first conspired with others to cheat and defraud the ATO under the fourth charge. I have looked at the possible outcomes from various angles and will now consider each.

Annulment of Ms Pitman's bankruptcy

68. It is not for the Tribunal to decide whether Ms Pitman's bankruptcy would be annulled were she to seek an order to that effect from the Court. That said, in the context of the merits review of an administrative decision such as the Commissioner's reviewable objection decision, I think that, for the moment, it is relevant to consider whether an annulment order is likely to be made. The consequences of any such order may be relevant issues in considering whether or not Ms Picton is a person who has standing to make an application to the Tribunal for review of the reviewable objection decision but only if annulment were to have any bearing on the charges. I will begin first with annulment.

69. It is clear from the principles in *Delph Sing* that, while regard is had to the whole of the circumstances, those circumstances are limited to those existing at the time that the sequestration order was made, in the case of a creditor's petition, or upon the Official Receiver's accepting a debtor's petition. Those circumstances may, or may not, have been known at that time but the Court will consider evidence that reflects on what they were. In this case, Ms Pitman must be presumed to have known of the judgment debt against her. It was entered against her by the Supreme Court in proceedings she contested. In his reasons for judgment, Derham AsJ refers to evidence filed on her behalf. Her having contested the proceedings is consistent with her earlier having lodged objections against

[71] (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256 at 475; 462; 271

the Commissioner's assessments and later lodging a debtor's petition, thereby becoming an active participant in the course of events leading to her own bankruptcy. Quite apart from that, issue, the Court would also look at the time that has elapsed between Ms Pitman's lodging her debtor's petition and any request for annulment.

70. If the Tribunal were to review the Commissioner's objection decision in this case and if it were to find that she did not have the tax liability as determined in the amended assessments, that would be a factor that post-dated Ms Pitman's bankruptcy. It would not be a relevant factor in determining whether or not her bankruptcy would be annulled by a Court.

71. It would follow that any review by the Tribunal of the Commissioner's objection decision would not have any impact on the fact of her bankruptcy or any impact on the factual matrix in which the criminal charges have been laid.

The Supreme Court's judgment

72. The judgment of the Supreme Court against Ms Pitman remains standing. The existence of a debt remains a valid issue in the charges laid against her. There is no evidence to suggest that Ms Pitman seeks to have that judgment set aside. Whether she would have standing to seek an order to that effect is an issue that has been considered in a number of cases including *Cummings v Petroleum NL*.[72] The High Court decided that Mr Cummings and Mr Fuller, who had become bankrupt before a judgment in the Federal Court had been delivered against them, had no standing to lodge an appeal against that judgment. The reasoning for reaching that conclusion differed amongst the Justices but that of the plurality was:

> *" So far as a judgment entered in an action against a bankrupt creates or evidences a provable debt, we respectfully agree that the bankrupt has no financial interest which would confer locus standi to appeal in his own name against the judgment. That is because it is fundamental to the law of bankruptcy that the bankrupt is divested of both his interest in his property and liability for his provable debts ...*
>
> *Of course, a money judgment entered against a bankrupt has the effect of increasing the amount of the debts provable in his estate. But it is immaterial that, if an appeal against the judgment were successful, there would or might be a surplus in the estate after the remaining creditors were paid. A bankrupt's contingent interest in a surplus does not give him an interest which would allow him to sue to enforce proprietary rights ...and, that being so, it cannot give him an interest to minimise liabilities. ..."*[73]

[72] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616; Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ

[73] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616 at [13]-[14]; 137-138; 8-9; 622 (citations omitted)

73. It would seem unlikely that Ms Pitman would have standing although it is not for me to decide. What I can decide, though, is that the judgment debt would remain standing even if Ms Pitman were to be a person who had standing to apply to the Tribunal. The judgment debt would remain standing even if the Tribunal were then to set aside the Commissioner's objection decision and substitute a decision that she had no taxation liability.

Bosanac

74. My attention was drawn to the case of *Bosanac*, in which McKerracher J referred to s 178 of the Bankruptcy Act. He did so saying that the contestability of the bankrupt remains open as it is open to the Court to grant relief to a bankrupt under s 178. That section provided:

> "**Appeal to Court against trustee's decision etc.**
>
> *(1) If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.*
>
> *(2) The application must be made not later than 60 days after the day on which the person became aware of the trustee's act, omission or decision.*"

75. Section 178 was repealed by the *Insolvency Law Reform Act 2016* (ILR Act) with effect from 1 September 2017.[74] The relevant provisions are now found in ss 90-15 and 90-20 of the IP Schedule. They were inserted by the ILR Act with effect from 1 March 2017.[75] Sections 90-15(1)-(3) provide, in part:

> "***Court may make orders in relation to estate administration***
>
> Court may make orders
>
> *(1) The Court may make such orders as it thinks fit in relation to the administration of a regulated debtor's estate.*
>
> Orders on own initiative or on application
>
> *(2) The Court may exercise the power under subsection (1):*
>
> *(a) on its own initiative, during proceedings before the Court; or*
>
> *(b) on application under section 90-20.*
>
> Examples of orders that may be made
>
> *(3) Without limiting subsection (1), those orders may include any one or more of the following:*
>
> *(a) an order determining any question arising in the administration of the estate;*
>
> *(b) an order that a person cease to be the trustee of the estate;*

[74] No. 11 of 2016: ILR Act; s 3; Schedule 1; Item 54 and for commencement see *Insolvency Law Reform (Transitional Provisions) Regulation 2016*; r 5(2)(p)

[75] No. 11 of 2016: ILR Act; s 3; Schedule 1; Item 2 and for commencement see s 2, Item 2

(c) an order that another person be appointed as the trustee of the estate;

(d) an order in relation to the costs of an action (including court action) taken by the trustee of the estate or another person in relation to the administration of the estate;

(e) an order in relation to any loss that the estate has sustained because of a breach of duty by the trustee;

(f) an order in relation to remuneration, including an order requiring a person to repay to the estate of a regulated debtor, or the creditors of a regulated debtor, remuneration paid to the person as trustee."

76. Section 90-20 provides:

"**Application for Court order**

(1) Each of the following persons may apply for an order under section 90-15:

(a) a person with a financial interest in the administration of the regulated debtor's estate;

(b) if the committee of inspection (if any) so resolves—a creditor, on behalf of the committee;

(c) the Inspector-General.

(2) If an application is made by a person referred to in paragraph (1)(b), the reasonable expenses associated with the application are to be taken to be expenses of the administration of the estate."

77. A person has a "*financial interest* in the administration of a regulated debtor's estate" in the circumstances set out in section 5-30.[76] One of those persons is the "*regulated debtor*".[77] Among those who are regulated debtors is a bankrupt.[78] As a bankrupt, Ms Pitman would be entitled to make an application under s 90-20. The orders that she could obtain would be relevant in the ongoing administration of her bankrupt estate. They would not relate to the state of Ms Pitman's affairs or her mental state at the time of the events that are the subject of the allegations in the four charges laid against Ms Pitman.

CONCLUSION

78. In seeking an extension of time within which to lodge an application against the Commissioner's objection decision, Ms Pitman has focused on an outcome that she thinks she will be able to achieve if she were successful in having the assessment reduced to Nil or otherwise varied. Even though her standing to make that application is the focus of my attention in this matter, it is important to consider her standing in the context in which it is

[76] Bankruptcy Act; Schedule 2, s 5-5

[77] Bankruptcy Act; Schedule 2, ss 5-5 and 5-30(a)(i)

[78] Bankruptcy Act; Schedule 2, ss 5-5 and 5-15

made. As the plurality of the High Court said in *Cummings*:

> " *In any event it is misleading to focus too much on the result intended to be achieved by the appeal. It is nature of an appeal which is important. The position as described by Hoffman LJ in* Heath v Tang *…:*
>
> > *'in principle a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in his trustee'.*"[79]

79. The nature of the application is to set aside the Commissioner's objection decision. Even if she were successful, it does not reflect on the essential elements of the criminal charges brought against her. Three of the charges are focused on the judgment debt of $2,057,798.53 entered against her in the Supreme Court of Victoria on 21 December 2017 and on whether she dishonestly obtained for herself a financial advantage from the ATO by evading that debt. The way in which she is alleged to have evaded that debt varies from charge to charge. Under the first, she is alleged to have given the Australian Financial Services Authority false or misleading information when she completed her statement of affairs as she was obliged to do under the Bankruptcy Act. Setting aside the Commissioner's assessment in any proceedings in the Tribunal would not have any impact on the elements of that charge.

80. The second and third charges relate to her alleged concealment of property on, in the second charge, 17 June 2015 and 21 October 2017 in the case of the third. The earlier date precedes her lodging an objection against the amended assessments, the date a final order was made against her by the Supreme Court and her lodging a debtor's petition. Whether Ms Pitman was acting dishonestly will depend upon her mental state at the time on 17 June 2015 and the circumstances applying at the time. The fact that she had lodged an objection before 17 June 2015 might be a relevant factor weighing against a determination that she had no belief that she had a legal right to gain a financial advantage but the ultimate success or otherwise of any outcome of her objection or its subsequent review is not.

81. The facts alleged in the third charge relate to 21 October 2017. That was shortly before Ms Pitman's objection was disallowed by the Commissioner. Again, the outcome of any review of the Commissioner's decision would not reflect on her mental state on 21 October 2017. A factor that might be relevant in showing her mental state and whether she acted dishonestly might be that she had not lodged an application for review of the Commissioner's objection decisions after she received notice of his decision dated

[79] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616 at [28]; 147-148; 628 (citations omitted)

31 October 2016. It might be relevant that she did not lodge an appeal against the Supreme Court's judgment delivered on 20 December 2017.

82. The fourth charge is that of conspiring with another or with others to cheat and defraud the ATO of her liability for an income tax debt by deception. Having regard to ss 321D and ss 321(2) and (3) of the Crimes Act, the Crown must both prove that Ms Pitman intended to commit the crime and must have believed that the tax debt, an element of the offence, existed at the time i.e. between 7 August 2014 and 3 April 2018. The Crown's task is not altered or affected by any subsequent application that she may be permitted to make to the Tribunal or even by any decision that might be made on any such review. Sections 321(2) and (3) provide:

> "***Conspiracy to commit an offence***
>
> *(1)* *…*
>
> *(2)* *For a person to be guilty under subsection (1) of conspiracy to commit a particular offence both he and at least one other party to the agreement—*
>
> *(a)* *must intend that the offence the subject of the agreement be committed; and*
>
> *(b)* *must intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place.*
>
> *(3)* *A person may be guilty under subsection (1) of conspiracy to commit an offence notwithstanding the existence of facts of which he is unaware which make commission of the offence by the agreed course of conduct impossible.*"

83. These are not matters for me to decide. What I must decide is whether any review of the Commissioner's objection decision, and any successful outcome for Ms Pitman of such a review, could have any relevance in the hearing of the criminal charges so that I might say that she is a person dissatisfied with the objection decision. While an application made within 28 days of the objection decision might possibly have had some relevance, an application for review lodged almost four years out of time does not. Therefore, I am not satisfied that Ms Pitman is a person who is dissatisfied with the Commissioner's objection decision. She is not a person entitled to lodge an application under s 14ZZ(1)(a) of the TA Act and so not a person entitled to seek an extension of time under s 29(7) of the AAT Act within which to do so.

DECISION

84. For the reasons I have given, I have decided that Ms Pitman is not a person who is, within the meaning of s 14ZZ(1)(a) of the TA Act, a person who is "*dissatisfied*" with the Commissioner's objection decision. Therefore, she is not entitled to make an application to

the Tribunal for review of that objection decision. As she is not entitled to do that, she is not entitled to make an application to extend the time within which to make an application for its review. Having come to that conclusion, I dismiss Ms Pitman's application for an extension of time under s 42B(1)(a) of the AAT Act on the basis that it is misconceived. It is misconceived because it assumes that the Tribunal has jurisdiction to entertain it when it does not. Although s 42A gives the Tribunal power to dismiss "*an application for review*" in those circumstances, the same power is given to the Tribunal to dismiss an application described in paragraph (b), (c), (d), (e), (f) or (h) of the definition of "*proceeding*" by s 69BA(1) of the AAT Act. An application for an extension of time comes within paragraph (h) of the definition of "*proceeding*" in s 3(1) of the AAT Act as an incidental application in connection with a proposed application.

ATTACHMENT A

RENUMBERED [34] TO [107] FROM *RE SINGH AND SECRETARY, DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS*

What is a civil proceeding: the authorities

85. On the face of s 60(2), whether Mr Singh's application to the Tribunal for review of the SSAT's decision is an action within the meaning of s 60(2) depends on whether it is a "*civil proceeding, whether at law or in equity*". The ordinary rules of statutory interpretation would suggest that taking the words individually in this way is an inappropriate approach. As Stamp J said in *Bourne v Norwich Crematorium Ltd*:[80]

> "*Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.*"[81]

At the risk of breaking that rule, I will consider first the meaning of the expressions "*civil proceeding*", "*law*" and "*equity*" separately in order better to understand them.

86. Although the "*law*" and its origins and underpinning principles have been the subject of a considerable amount of academic debate, it is enough to note that:

> "*A law is an obligatory rule of conduct. The commands of him or them that have coercive power (Hobbes). A law is a rule of conduct imposed and enforced by the Sovereign (Austin). But* the *law is the body of principles recognised and applied by the State in the administration of justice (Salmond). …*"[82]

[80] [1967] 1 WLR 691; 2 All ER 576

[81] [1967] 1 WLR 691; 2 All ER 576 at 696; 578

[82] *A Concise Law Dictionary*, 5th edition, PG Osborn, 1964

87. "*Equity*" is the term used to describe the principles that originally guided the Court of Chancery in Mediaeval England in attempting to remedy some of the defects that followed the strict application of the law. The principles were originally based on conscience, reason and good faith but developed in the same way that the law, other than statutory law, developed. That is, it was developed by the application of the principles it identified to individual cases. Principles applied in one case were applied to another if its facts could not be distinguished. Equity applied where the law did not but, if the law did apply, equity gave way for all practical purposes for, as it was said, equity followed the law. Where the law did not apply, the Court of Chancery crafted new rights and remedies after looking to sources, such as Roman law and canon law, beyond the Lord Chancellors' own consciences and experiences. As Lord Cowper, Lord Chancellor in 1705 said:

> " *Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtilties* [sic]*, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.*"[83]

88. There is, therefore, a distinction between law and equity and actions have been brought in different ways in each. In enacting s 60(2), Parliament has been very clear that no distinction is to be drawn between them when a person becomes bankrupt. Both are stayed until the trustee makes an election to go ahead with the action or to discontinue it.

89. Proceedings in the Tribunal are clearly not proceedings in equity but are they a "*civil proceeding*"? In the law, the word "*civil*" distinguishes the proceeding from a criminal proceeding. It relates to "*… cases about individual rights, etc, not criminal cases. …*".[84] Is it a "*proceeding at law*"? A "*proceeding*" has acquired a broad meaning although not without its limitations. Its ordinary meanings include:

> "*… **4** A particular action or course of action; a piece of conduct or behaviour. In* pl…, *doings, actions; the business transacted by a court, assembly, or society;* esp. *a published record of papers delivered at a meeting of a learned society or a conference …*"[85]
>
> *"… **1.** a particular action or course of action. **2.** action, course of action or conduct. **3.** the act of one who or that which proceeds. **4.** (*pl.) *records of the doings of a society. **5.*** Law ***a.** the instituting or carrying on of an action at law. **b.** a legal step or measure:* to institute proceedings against a person."[86]

[83] *Dudley (Lord) v Dudley (Lady)* (1705) Prec. Ch. 241 at 244

[84] Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

[85] *The New Shorter Oxford English Dictionary*, 3rd edition, 1993

[86] *The Macquarie Dictionary*, 2nd edition, 1991

90. On its ordinary meanings, therefore, a "*civil proceeding*" is an action relating to the rights and duties and the like of an individual and not to whether an individual has transgressed the acceptable norms of behaviour as determined according to the criminal law. It could be said that matters in the Tribunal do not come within the ordinary meaning of a civil proceeding for it does not relate to rights and duties in the sense of settling disputes about existing rights and duties or enforcing its decisions. They are the actions of a court in a civil proceeding. The Tribunal is not a court and, under the doctrine of separation of powers applying in the Commonwealth Constitution, cannot be a court or exercise judicial power.[87] It exercises administrative or executive power and, under the same doctrine, a court cannot exercise administrative or executive power. An exercise of administrative or executive power leads to the creation of rights and entitlements. The fact that it does so means that corresponding or correlative duties or obligations are imposed on the decision-maker. So, for example, the Tribunal's decision that a person is entitled to an age pension under the Social Security Act gives that person a right to the age pension and imposes a correlative duty on the Secretary to pay it according to the terms of the enactment.

91. Has the term "*civil proceeding*" been considered in the context of a proceeding of the sort conducted by the Tribunal? It has been considered in the context of s 16 of the *Service and Execution of Process Act 1901* (Cth). Section 16 provides, in part, that, if a summons has been issued by any Court or Judge in any State, requiring any person to appear to give evidence or to produce documents in any "*civil proceeding*", that summons may be served in any other part of the Commonwealth. Isaacs and Gavan Duffy JJ said in *Cheney v Spooner*:[88]

"*… A 'proceeding', used broadly as it is in section 16 of the* Federal Service and Execution of Process Act*, is merely some method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer.*"[89]

The emphasis in *Cheney v Spooner* is upon the judicial be it the court or the officer. For the reasons I have given earlier, the Tribunal is not judicial.

92. An arbitration is conducted by a person who is not acting in the exercise of judicial power but who may well be acting under and according to an enactment. It has been held to be a civil proceeding in the context of the *Companies (Queensland) Code* as it was then in force.

[87] See generally, *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350; 234 ALR 618; 81 ALJR 1155; 95 ALD 220

[88] (1929) 41 CLR 532

[89] (1929) 41 CLR 532 at 536-537

Kelly J did so in *Re Vassal Pty Ltd*[90] (*Vassal*) when his Honour said:

> "*The primary question raised by the originating summons is whether arbitration is a 'civil proceeding' within the meaning of s. 371(2) of the* Code. *If it is such a proceeding, leave under that subsection is required to commence it whereas, if it is not, no such leave is necessary. …*
>
> *The matter appears to be free of any direct authority, although there are a number of judicial pronouncements on the meaning of the word 'proceeding' in this and other contexts.*
>
> *In* In re International Pulp and Paper Co. *(1867) 3 Ch.D. 594, at p.599, Jessel M.R. held that the words 'action, suit, or other proceeding' in s. 87 of the Companies Act 1862 ought to be read generally and that there was no reason to limit them except that the Court had no power to enforce its order. The question which there arose was whether the Court had power to restrain proceedings commenced in the Irish Courts against a company which had been ordered to be wound up and the Master of the Rolls held that it had power to do so. In* Haupiri Courts Limited (in Liquidation) v. Piako Construction Limited *[1969] N.Z.L.R. 401 Perry J. in considering the provisions of the New Zealand legislation which correspond to s. 371(2) of the* Code*, after referring to* In re International Pulp and Paper Co. (*supra) observed, at p. 404, 'It would seem clear that the word "proceeding" is a word which must be given a wide meaning and, I think, a wider meaning than the word "action".' The learned judge also referred to some authorities dealing with other legislation to the effect that the words 'action or proceeding' meant a proceeding in which a* lis *was instituted or was 'between parties'. In* R. v. Westminster (City) London Borough Council Rent Officer, Ex parte Rendall *[1973] 1 Q.B. 959, at p.974, Lord Denning M.R. referring to the word 'proceedings' in the Rent Act 1968 took the view that it covered any proceedings of a legal nature, even though they did not take place in a court of law.*
>
> *In* Alliance Petroleum Australian (N.L.) v. Australian Gas Light Co. *(1983) 48 A.L.R. 69 the South Australian Full Court considered the question whether the phrase 'in any … proceeding' in s. 16 of the* Service and Execution of Process Act *1901 (C'wealth) applied to arbitral proceedings founded upon a 'submission' within the meaning of the Arbitration Act 1891 (S.A.). King C.J. and Wells J. held that the phrase did so apply whilst Zelling J., who dissented, took the view that the arbitration in the instant case did not consist of justiciable issue triable civilly and was not a proceeding taken from the ordinary courts and as the contemplated arbitration there had been no resemblance to a curial arbitration it was therefore outside the ambit of s. 16. King C.J. said, at p. 73:*
>
> > 'Arbitration is a regular procedure recognised by statute for the resolution of legal claims, differences or disputes between parties. Rules of law are prescribed by statute for the conduct of arbitrations. Statutory powers are conferred on arbitrators. The jurisdiction of the courts is invoked in aid of the arbitration procedure. Attendance of witnesses may be compelled, witnesses may be sworn and wilfully false evidence before an arbitrator constitutes the crime of perjury. The procedure results in an award which is enforceable at law. Arbitration is clearly recognized by the statute as a method of resolving legal disputes alternative to litigation in the courts. I think that in the ordinary use of language such a procedure would be included in the description "civil proceedings". There is no authority to the contrary.'
>
> *A much narrower view of the meaning of the word 'proceeding' in the section of the Companies Act 1948 (U.K.) which corresponds broadly to s. 367(6) of the* Code *was taken by Lord Simon of Glaisdale in* Herbert Berry Associates Ltd. V. Inland

[90] [1983] 2 Qd R 769; (1983) 8 ACLR 683; 2 ACLC 53

Revenue Commissioners *[1978] 1 All E.R. 161, at p. 170, where the learned Law Lord said:*

> 'The Companies Act 1948 is a statute dealing with technical matters; and one would expect the words therein to be used in their primary sense as terms of legal art. The primary sense of "action" as a term of legal art is the invocation of the jurisdiction of a court by writ; "proceeding" the invocation of the jurisdiction of a court by process other than writ.'

A question had been raised in the courts below as to whether a distress was a 'proceeding' within the meaning of the section but the matter was not argued on the appeal to the House of Lords and Lord Simon of Glaisdale considered that it would be appropriate in the circumstances to express a concluded opinion. The passage which I have set out and on which counsel for the applicant relies is clearly obiter and although, of course, great respect must be accorded to the view which it expresses it does appear to stand alone.

On consideration of all the authorities to which I have referred and in particular the passage in the judgment of King C.J. in Alliance Petroleum Australia (N.L.) v. Australian Gas Light Co. *(supra) I am of the opinion that 'civil proceeding' in s. 371(2) of the* Code *includes an arbitration. The proceedings are between the parties and have the characteristics to which King C.J. refers. I can see no warrant for limiting the term to proceedings taking place in a court. I am therefore not prepared to make the declaration sought and I hold that leave is required to commence the arbitration which is the subject of the originating summons."*[91]

93. The principles in *Vassal* are not directly applicable to a proceeding in the Tribunal. While the role of the Tribunal and its powers are defined by Parliament and those of an arbitrator may well be, there is an important difference in their roles. The Tribunal creates rights and entitlements but an arbitrator resolves legal claims, differences or disputes between parties and, in doing so, determines their respective rights and duties and the like. Recognition of arbitration as a civil proceeding is understandable but, given the essential differences in the nature of the outcome of the task[92] it undertakes, it may be that a Tribunal proceeding falls outside the meaning of a "*civil proceeding*" on the authorities relating to matters other than the Bankruptcy Act.

94. I have referred to the traditional distinction between matters that are at law and those in equity but it may be that the traditional distinction is not that which is intended in s 60(5) of the Bankruptcy Act. The expression "*at law* may simply mean "*according to law*".[93] If that is

[91] [1983] 2 Qd R 769; (1983) 8 ACLR 633 at 770-772; 684. See also *Alliance Petroleum Australia (NL) and Others v Australian Gas Light Co* (1982) 44 ALR 124 (Bollen J) and *TNT Bulkships Ltd v Interstate Construction Pty Ltd* (1985) 35 NTR 15 (O'eary J).

[92] I emphasise that the difference lies in the nature of the outcome of the task for the task that is undertaken by a court considering a civil matter is one part of the task that faces the Tribunal. The task of a court is to consider the pleadings, consider the issues raised by those pleadings, consider the evidence, make findings of fact and come to a decision on the matter. The Tribunal must consider the enactment, consider the issues it raises regardless of whether the parties have raised them, consider the evidence and whether it requires more, make findings of fact, determine the correct decision and, if there is more than one correct decision, determine the factors that it must take into account in exercising its discretion to choose one and come to a decision. Both a court and the Tribunal must apply the law and must act with procedural fairness.

[93] Black' Law Dictionary, 5th edition, 1979

the correct interpretation, it may be that an application under s 27 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) for review of a decision that it is given power to review under an enactment may be described as a proceeding according to law. It is made according to law in the sense that it is made in accordance with law made by Parliament.

95. This would seem to be the interpretation adopted by Lehane J, with whom Whitlam J agreed, in *McCallum v Commissioner of Taxation*[94] (*McCallum*). Section 14ZZ(a) of the *Taxation Administration Act 1953* (TA Act) provides that a person dissatisfied with the Commissioner's reviewable objection decision may apply to the Tribunal for review of that decision. Lehane J, with whom Whitlam J agreed, said that "*… an application for review under s 14ZZ of the Administration Act is a 'legal proceeding' …* [and] *is a legal proceeding which relates to the administration of the estate …*"[95] of the bankrupt. In *McMahon v Block*,[96] Katzmann J noted that the Commissioner did not dispute, for the purposes of the proceeding, that proceedings in the Tribunal are civil proceedings within the meaning of s 60(5).

Authorities relating to rights to commence proceedings after becoming bankrupt

96. Although slightly constrained in its effect by the later case of *Griffiths v Civil Aviation Safety Authority*[97] (*Griffiths*) I will begin with the case of *Fuller v Beach Petroleum NL*[98] (*Fuller*). While waiting for a judgment that had been reserved in the Federal Court, another Judge of that Court made a sequestration order against Mr Fuller. Judgment was then entered against Mr Fuller and others holding them liable in tort for conspiracy to do unlawful acts including acts in breach of their fiduciary duties as directors. Mr Fuller lodged a notice of appeal against the judgment. In so far as the judgment debt related to the breach of fiduciary duties, it was a provable debt under s 82(2) of the Bankruptcy Act but not otherwise. Section 60(2) was not relevant as it applies only to actions that have already been begun and are on foot when a person becomes bankrupt.

97. The majority took as their premiss the proposition that the statutory right of appeal under s 24 of the *Federal Court of Australia Act 1976* (FCA Act), for example, to a party against whom judgment has been entered comes within the meaning of "*property*" as defined in s 5(1) of the Bankruptcy Act and so is vested in the trustee under s 58(1).[99] They then

[94] (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256

[95] (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256 at 474; 460; 269

[96] [2010] FCA 947

[97] [1996] FCA 1502; (1996) 67 FCR 301; 137 ALR 521; 41 ALD 50; Spender, Einfeld and Cooper JJ

[98] [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235; Gummow, Hill and Whitlam JJ

[99] [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235 at [30]; 67; 242 per Gummow and Whitlam JJ

moved to their conclusion that Mr Fuller could not proceed with his appeal on the following basis adding:

> " *It is consistent with the policy of the Act that after sequestration of the estates of unsuccessful litigants the successful party not be put at the risk of sustaining further costs of appellate litigation. The respondent to the appeal should not be left to seek what may turn out to be an inadequate order for security for costs. It is also in the interests of the orderly administration of the estate of the bankrupt that it be for the trustee to decide whether appeals of the nature involved here be instituted or continued. We say nothing as to facility that the Act may offer to test, within the administration, any decision so made by the trustee; cf s. 178 of the Act.*"[100]

98. In dissent, Hill J concluded that a right to appeal against a judgment where damages had been awarded against the appellant and there is no cross-claim is not property divisible among the creditors vesting in the trustee under s 58(1).[101] His Honour said:

> " *I do not think that the fact the appeal, if successful, may carry with it an order for costs makes any difference. Actions for damages for personal injury etc also carry with them the potential for costs but it was not suggested for that reason that they should be treated as property divisible among creditors in the United Kingdom legislation, or for that matter apportioned into that which is divisible on the one hand and that which is not on the other. All the right to costs amounts to is a right to have the Court exercise a judicial discretion in favour of the winning party. That, however, in my view is not a right of property. It is not itself assignable, nor does it have the indicia of property, to which reference has already been made.*"[102]

99. The appeal in *Fuller* was heard with that of Mr Cummings: *Cummings v Petroleum NL*[103] (*Cummings*). Before the High Court heard that appeal, a differently constituted Full Court of the Federal Court heard the case of *Griffiths*. That Full Court delivered its judgment shortly before the High Court delivered its in *Cummings*.

100. *Griffiths* also concerned a right of appeal that arose after Mr Griffiths had become bankrupt.[104] It was an appeal from the Tribunal's decision to affirm a decision by the then Civil Aviation Authority to impose conditions on two aviation licences held by Mr Griffiths. Spender J characterised the issue in this way:

> "*… If those licences are not 'property', the right to take proceedings to appeal a decision affirming restrictions on those licences is not 'property divisible among the creditors of the bankrupt' and, as a consequence, did not vest in the trustee when the right of appeal arose.*"[105]

[100] [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235 at [34]; 68; 243

[101] [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235 at [43]; 77; 252

[102] [1993] FCA 453; (1993) 43 FCR 60; 117 ALR 235 at [31]; 75; 249

[103] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616; Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ

[104] Consequently, s 60(2) did not apply.

[105] [1996] FCA 1502; 67 FCR 301; 137 ALR 521; 41 ALD 50 at 305; 524 ; 52

101. His Honour answered the issue*:*

> "*18. In my opinion, a licence to drive a motor vehicle is not 'property divisible amongst the creditors' within s 116(1)(a) of the Act because such a licence is not property. It follows further that a capacity to exercise or to take proceedings for exercising all such powers in, over or in respect of a driving licence is also not property divisible amongst the creditors of the bankrupt, within s 116(1)(b) of the Act.*
>
> *19. Similarly, in my opinion, neither a commercial pilot (aeroplane) licence nor a commercial pilot (helicopter) licence is 'property' that belonged to or was vested in the bankrupt at the commencement of his bankruptcy and therefore is not to be characterised as 'property to be divisible amongst the creditors of the bankrupt' and, as a consequence, is not property which vested on bankruptcy in the trustee.*
>
> *20. Further, the capacity to exercise and to take proceedings for exercising all such powers in, over or in respect of either of those licences, as might have been exercised by the bankrupt for his own benefit at any time after the commencement of the bankruptcy and before his discharge, is not property divisible amongst the creditors of the bankrupt, because the capacity to exercise and take proceedings for exercising powers over or in respect of those licences is not the capacity to exercise or to take proceedings for exercising powers over or in respect of 'property'.*
>
> *21. The consequence is that the right to bring proceedings pursuant to s 44(1) of the AAT Act to challenge a decision of the Tribunal made in respect of the two licences of Mr Griffiths did not vest in the trustee when the Tribunal's decision was given on 31 May 1994, and Mr Griffiths was competent to bring those proceedings in this Court.*
>
> *22. The contrary conclusion runs into a further difficulty, in that s 44(1) of the AAT Act provides that 'a party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law from any decision of the Tribunal in that proceeding'. The terms of s 44(1) would seem to preclude the trustee from appealing to the Federal Court of Australia from the decision concerning Mr Griffiths' licence.*"[106]

102. Cooper J expressly disagreed with the conclusion of the majority in *Fuller* that any right of appeal under the FCA Act, including a bare right of action personal to the bankrupt, is property within the meaning of s 5(1) of the Bankruptcy Act.[107] His Honour continued:

> " *In my view, 'property' in s 5(1) of the Act does not include a statutory right in the nature of an appeal under s 44 of the AAT Act nor an appeal pursuant to s 19 of the Federal Court Act, with which we are here concerned. The statutory right does not affect any property which forms part of the bankrupt's estate and which vests in the trustee as property of the bankrupt. Nor will the institution and prosecution of the proceedings by Mr Griffiths delay the administration of the estate or expose it to any adverse order for costs. If Mr Griffiths fails in the proceedings against the respondent CAA, any order for costs against him is not provable in his estate because it would be a debt which arose after the date of the sequestration order (*Re British Gold Fields of West Africa *(1899) 2 Ch 7 (CA) at 11 - 12;* In re Davis; Ex parte National Australia Bank Ltd v Official Trustee in Bankruptcy *(unreported, Federal Court of Australia, 11 October 1989, Burchett J at p 10).*

[106] [1996] FCA 1502; 67 FCR 301; 137 ALR 521; 41 ALD 50 at 306; 525-526; 53

[107] [1996] FCA 1502; 67 FCR 301; 137 ALR 521; 41 ALD 50 at 321; 539; 66 and see also Einfeld J at 318; 536; 63-64

The question of the possibility of any adverse cost orders being made against Mr Griffiths if he fails in his appeal, and his ability to satisfy those orders is, in my view, a question separate and distinct from the proper construction of ss 5, 58, 60 and 116 of the Act. In this respect I agree with Hill J in Fuller *(43 FCR at 76). The general rule is that poverty is no bar to a natural person to litigate a right of action and the power to require security for costs ought not to be used to bar the poor from the courts (*Cowell v Taylor *(1885) 31 ChD 34 at 38). However, in appropriate circumstances security for costs may be ordered against an undischarged bankrupt; the decisions in* Barton v Minister for Foreign Affairs *(1984) 2 FCR 463 and* Skase v Abbott and Sun Newspapers *(unreported, Federal Court of Australia, 30 July 1992, Cooper J) are examples of such orders being made. Further, the existence of the exception in s 60(4) and s 116 (2)(g) for causes of action for personal injury indicate that the question of costs in respect of that litigation which the bankrupt is entitled to institute or continue was not for the Parliament in passing the Act either a concern of the Act or of the administration of the estates of the bankrupts.*

There is a unity of object and purpose in the operation of ss 58, 60 and 116 of the Act if it is recognised that the consistent focus of attention is upon rights which the trustee can turn to advantage for the benefit of creditors or upon rights the exercise of which will adversely affect or delay the administration of the estate. It is these rights which fall within the definition of 'property' in s 5 and the enforcement of which by action are stayed by s 60(2) upon a person becoming bankrupt. To interpret 'property' for the purposes of s 5 in this way avoids the injustice of denying to the bankrupt the power to exercise a right in which the trustee has no interest and the exercise of which cannot operate adversely on the property of the bankrupt or the administration of the bankrupt's estate.

The right of Mr Griffiths to appeal to this court from the decision of the Tribunal and his right to appeal from the judgment of Kiefel J are such rights and did not vest in the Official Trustee upon acquisition by Mr Griffiths. Neither Mr Griffiths' appeal from the Tribunal to the original jurisdiction of this court, nor his appeal from the order of Kiefel J to the Full Court is incompetent in consequence of his bankruptcy."[108]

103. In *Cummings*, all of the Judges concluded that Mr Cummings and Mr Fuller had not had *locus standi* to institute the appeals but they did not agree on their reasons for reaching that conclusion. The essence of the reasons of the majority, Brennan CJ, Gaudron and McHugh JJ was that:

> " *So far as a judgment entered in an action against a bankrupt creates or evidences a provable debt, we respectfully agree that the bankrupt has no financial interest which would confer locus standi to appeal in his own name against the judgment. That is because it is fundamental to the law of bankruptcy that the bankrupt is divested of both his interest in his property and liability for his provable debts …*
>
> *Of course, a money judgment entered against a bankrupt has the effect of increasing the amount of the debts provable in his estate. But it is immaterial that, if an appeal against the judgment were successful, there would or might be a surplus in the estate after the remaining creditors were paid. A bankrupt's contingent interest in a surplus does not give him an interest which would allow him to sue to*

[108] [1996] FCA 1502; 67 FCR 301; 137 ALR 521; 41 ALD 50 at 325-326; 542-543; 69-70

> *enforce proprietary rights …and, that being so, it cannot give him an interest to minimise liabilities. …*"[109]

104. Dawson and Toohey JJ decided that the right of appeal held by each of Mr Cummings and Mr Fuller vested in the trustee. It is the nature of the appeal that is important rather than what a potential appellant would hope to achieve by the appeal. Their Honours adopted a passage from *Heath v Tang*,[110] in which it had been said that:

> "*in principle a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate of his trustee.*"[111]

They concluded that "*The judgment is a judgment for a sum of money which cannot be pursued against the appellants save through the machinery of the Act.*"[112]

105. In *McCallum*, Mr McCallum was a bankrupt well before he sought to apply to the Tribunal for review of the Commissioner's objection decision. Lehane J looked to the assessment which, under s 177(1) of the *Income Tax Assessment Act 1936* (ITAA36) is conclusive evidence of the due making of the assessment and, except in proceedings for review or appeal under Part IVC of the TA Act, is conclusive evidence that all of the particulars of the assessment are correct. He compared it with a judgment debt:

> " *It is true that, as a result of s 177 of the Assessment Act, there is a very important difference between a debt due under the assessment and other provable debts: the trustee cannot reject a proof for a tax debt on the ground that the assessment is excessive. There is also a significant difference between the debt due under the assessment and a judgment debt: the latter, unlike the former, results from a process in which the creditor has established, to the satisfaction of a court, both the existence and amount of the debt. But if the question is, from the standpoint of the principle for which cases such as* Cummings v Claremont Petroleum NL … *and* Heath v Tang *… are authority, is there a relevant distinction in principle between the right to seek review of an objection decision and the right to prosecute an appeal against a judgment for debt, it is difficult to see why the answer is not, there is no difference. …*"[113]

106. Lehane J took the view that he should first decide if the trustee had standing to apply for a review of the objection decision. He decided that the trustee did have standing on the basis that an application for review under s 14ZZ of the TA Act is a "*legal proceeding*" relating to the administration of the estate. Therefore, the trustee could exercise power under s 134(1)(j) of the Bankruptcy Act to "*bring, institute or defend any action or other legal proceedings relating to the administration of the estate*." Any suggestion that the right to

[109] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616 at [13]-[14]; 137-138; 8-9; 622 (citations omitted)
[110] [1993] 1 WLR 1421; [1993] 4 All ER 694 at 1425; 700
[111] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616 at [28]; 148; 16; 628
[112] [1996] HCA 19; (1996) 185 CLR 124; 137 ALR 1; 70 ALJR 616 at [29]; 148; 17, 628
[113](1997) 75 FCR 458: 145 ALR 446 at 471-472; 458-459

apply for review was personal to the taxpayer was not seen as a difficulty in *Cummings* or in *Heath v Tang*, Lehane J said.

107. Mr McCallum did not necessarily lack standing but, whether he did, depended on whether he was a person dissatisfied with the decision. The same test applies where a party to proceedings is adversely affected by a final judgment or order and an appeal lies from the judgment or order. In those circumstances:

> "*… It is not altogether easy to see that a test of dissatisfaction with a decision is likely to confer standing on a taxpayer to a more generous extent than a right of appeal does on a party to litigation adversely affected by an order made in it. Thus, with great respect, I am unable to see any firm basis on which the principle laid down in* Cummings *should be held not to be applicable here. If, in the one case, standing is lost because the debt concerned is payable solely out of the bankrupt estate, and is no longer otherwise recoverable from the debtor, I can see no reason why that is not equally so in the other case; and if, in the one case, it makes no difference that the success of the appeal may result in a surplus in the estate (*Cummings *at 138) I cannot see why it does not equally make no difference in the other case, where a successful review may equally result in a surplus.*"[114]

108. I note that, in *Baulkham Hills Shire Council v Stankovic*[115] (*Stankovic*), Beazley JA summarised *Cummings* as:

> "*… authority for the proposition that insofar as a judgment against a bankrupt results in a judgment debt provable in the bankruptcy, the bankrupt does not have a financial interest in the appeal so as to confer locus standi to appeal in his or her own name against the judgment. The majority, Brennan CJ, Gaudron and McHugh JJ, rejected the proposition that a right to appeal was property of the bankrupt so as itself to be vested in the trustee.*"[116]

109. The final case to which I will refer in this section is that of *Randall v Deputy Commissioner of Taxation*[117] decided by Lander J. A sequestration order had been made against Mr Randall in September 2007 and a few months before he accepted an offer of employment with the Australian Taxation Office (ATO). It was a condition of his employment that he was on probation for the first three months of his engagement. A delegate of the Commissioner terminated his employment at the end of his probation period. Mr Randall sought judicial review of the Commissioner's decision and orders that the decision was null and void and requiring the Commissioner to do all things necessary to enable him to resume his duties as on ongoing employee with the ATO and to receive his salary.

[114] (1997) 75 FCR 458; 145 ALR 446 at 475; 461-462

[115] [2009] NSWCA 281

[116] [2009] NSWCA 281 at [13]

[117] [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41

110. The Commissioner objected to the competency of Mr Randall's application on the basis that he lacked standing due to his bankruptcy. Lander J reviewed a number of authorities including *Cummings* and *Griffiths*. He noted that:

> " *Property which is not divisible amongst the bankrupts' creditors is not property of the bankrupt which vests in the bankrupt's trustee.*
>
> *A bankrupt's personal earnings after bankruptcy or income do not vest in the bankrupt's trustee. They are not property of the bankrupt. In* Nette v Howarth *(1935) 53 CLR 55 at 65, Dixon J said, after referring to authorities in England and Australia:*
>
> > *… the rule long established in bankruptcy, [is] that the personal earnings of a bankrupt do not pass to his trustee except to the extent that they are not required for the support of himself and his family."*[118]

111. The Bankruptcy Act has been amended since *Nette v Howarth* was decided and the scheme of contributions introduced. I have referred to that already. Despite its amendment, Lander J said that:

> "*… the Act continues to recognise … that the bankrupt's income is not part of the bankrupt's property except to the extent that a contribution is made. If it were otherwise, there would be no need for the Division 4B machinery because the trustee would be entitled to the bankrupt's income and wages. The Act continues to recognise the principle enunciated by Dixon N in* Nette v Howarth *53 CLR 55 and recognises, as the law has since 1785, that income and earnings do not form part of the bankrupt's estate:* Chippendall v Tomlinson *(1785) L Co Bank L 428 per Lord Mansfield at 432; and 99 ER 900 at 902."*[119]

112. Lander J applied this principle to the case before him:

> "*…* [T]*he Bankruptcy Act still contemplates that income earned after the bankrupt's bankruptcy does not vest in the bankrupt's trustee:* Re Gillies *(1993) 115 ALR 631 at 636-637. While the trustee may require the bankrupt to make contributions out of the bankrupt's income, the Bankruptcy Act contemplates that those contributions will be made out of income in the hands of the bankrupt and not the trustee.*
>
> *… The bankrupt's income, after bankruptcy, does not vest in the bankrupt's trustee.*
>
> *If the bankrupt's income does not vest in the trustee, it must be because it is not property, or at least property divisible among the bankrupt's creditors.*
>
> *In those circumstances, the trustee cannot sue for wages or income due to the bankrupt because those wages or that income have not vested in the trustee:* Williams v Chambers *(1847) 10 QB 335; 116 ER 130. Indeed, even if the Court ordered (under the repealed s 131) or the trustee assessed contributions payable by the bankrupt to the trustee, no right to recover that sum or those sums vests in the trustee against the employer. The liability to pay that sum or those sums is imposed upon the bankrupt.*
>
> *The right to seek a review of the respondent's decision to terminate the applicant's employment remains with the applicant. The trustee has no interest in seeking a review of that decision. The trustee, for example, could not ensure that if*

[118] [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41 at [49]-[50]; 449; 196; 49

[119] [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41 at [57]; 450; 197; 50

> *the decision were reversed that the applicant would resume employment. If the trustee was interested in the proceeding and brought the proceeding and the decision was quashed as the applicant seeks in this proceeding, there would be no property in the result which would be divisible among the applicant's creditors. The right to seek an order quashing the decision of the respondent to terminate the applicant's employment is not a right which can be exercised beneficially for the creditors, even in circumstances where the applicant seeks the further orders which may result in a sum of money being paid to him by way of compensation. Whether if the bankrupt received compensation that money would become after-acquired property for which he would have to account to his trustee does not need to be determined on this application: see* Chippendall v Tomlinson *(1785) L Co Bank L 428; 99 ER 900*."[120]

113. As the right to sue for a bankrupt's earnings, wages or income does not vest in the trustee, the right was exercisable by Mr Randall.[121]

Authorities relating to continuation of proceedings commenced before bankruptcy

114. In *Lofthouse (In the matter of Guss)*[122] (*Lofthouse*), Mr Guss and his daughter were plaintiffs in a proceeding in the Supreme Court of Victoria when the Federal Court made a sequestration order against Mr Guss's estate. The defendant was the Geelong Building Society (GBS). Mr Guss and his wife were the registered proprietors of real property at Portsea. They held the property on trust for their three children. They mortgaged the property to GBS, which subsequently exercised its power of sale and sold the property. Mr Guss and his daughter allege that GBS sold the property at price below its value. They also alleged that GBS owed them a duty of care to act reasonably, fairly and in good faith in respect of the sale of the property, having regard to his interest as mortgagor and trustee and to her interest as a beneficiary of the trust.

115. Gray J considered two issues. The first was whether the Supreme Court proceeding was an "*action*" for the purposes of s 60 so that the trustee was required to make an election regarding it. That required consideration of whether an "*action*" included a proceeding brought as a trustee for another by a person who was subsequently made bankrupt. If it was an "*action*", the second issue was whether Mr Lofthouse had made a valid election to prosecute the Supreme Court proceeding but that is not relevant in this case.

116. As to the first issue, his Honour said:

> 1 " *In s 60(5), the legislature has defined 'action' for the purposes of the section as meaning any civil proceeding, whether at law or in equity. This is plainly a definition of great width. It has been recognised to be so in several contexts. In* John v Neiman Holdings Pty Ltd *(1986) 84 FLR 84, Young J of the Supreme Court*

[120] [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41 at [72]-[76]; 452-453; 199-200; 52

[121] [2008] FCA 1939; (2008) 174 FCR 441; 74 ATR 188; 110 ALD 41 at [78]; 453; 200; 53

[122] [2001] FCA 25; (2001) 107 FCR 151

of New South Wales held that s 60(2) operated to stay the whole of a proceeding, even though the bankrupt concerned was only one of several plaintiffs, whose claim was separate from those of the other plaintiffs, although raising common questions of law and fact. In Daemar v Industrial Commission of New South Wales *(1988) 79 ALR 591, the Court of Appeal of New South Wales held that an application for relief in the nature of prerogative writs directed to the Industrial Commission of New South Wales was an 'action' for the purposes of s 60(2). At 596, after referring to ss 58, 60 and 116 of the Act, Kirby P (as his Honour then was, and with whose judgment the other two members of the Court of Appeal expressed agreement) said:*

> *' These provisions make it clear that the scheme and purpose of the Act is, upon the debtor's becoming a bankrupt, to transfer property rights, including certainly the right to sue in respect of claims to property, from the bankrupt to his trustee. This is so, notwithstanding that it involves personal inconvenience to the bankrupt: see* Faulkner v Bluett *(1981) 52 FLR 115 at 119. Indeed, it is so notwithstanding the fact that it deprives the bankrupt of important civil rights which he or she would otherwise normally enjoy. It is of the essence of bankruptcy, as provided for by the Act, that property which belongs to the bankrupt, including choses in action (other than those which are specifically exempted) are vested upon bankruptcy in the bankrupt's trustee. The trustee has the charge of the estate of the bankrupt. It is then for the trustee to distribute that property as the Act provides, principally for the benefit of the creditors. To secure the benefits and protections which the Act provides to a debtor, the debtor's status is changed, rights are diminished and property is controlled. It could scarcely be otherwise for if it were, valuable interests which a bankrupt might have, in the form of choses in action would not be caught in the net cast by the very wide language of s 116(1). This would be so despite the specific and limited terms of the exemption in the case of rights to recover damages or compensation provided by s 116(2) and the very purposes of gathering in the bankrupt's property.'*

It is clear from these authorities that the approach of the courts has been to regard the word 'action' in s 60 as casting a net widely."[123]

117. Gray J examined the scheme of the Bankruptcy Act:

> 2 " *Section 60 is an adjunct to the scheme of the Act whereby the property of a bankrupt passes to the bankrupt's trustee consequent upon a sequestration order. By s 58 of the Act, the property of a bankrupt vests forthwith in the Official Trustee or a trustee in bankruptcy when a debtor becomes a bankrupt. That section has the effect of vesting in the trustee in bankruptcy all rights of action in pending proceedings commenced by the bankrupt. Even if it be the case that property of which a bankrupt is a bare trustee for someone else does not pass to the trustee in bankruptcy (because such property is not available for distribution to the bankrupt's creditors), it does not follow that s 60 must be construed as excluding proceedings brought by the bankrupt as trustee.*
>
> 3 *Section 60 is not the provision that vests the right of action in the trustee in bankruptcy. It has a different, and in some respects wider, role. It operates to stay pending proceedings unless the trustee elects to prosecute or discontinue them. It also provides the machinery for a defendant or other party to a pending proceeding to force the making of an election. It is directed towards the protection of the bankrupt's creditors, by preventing the unnecessary dissipation of the assets of the estate in fruitless litigation. In my view, s 60 also has the purpose*

[123] [2001] FCA 25; (2001) 107 FCR 151 at [16]; 156-157

of protecting a defendant or other party to a pending proceeding. A defendant or other party to a pending proceeding suffers an immediate detriment upon the plaintiff becoming a bankrupt. The detriment is that if the defendant or other party should be successful in the proceeding, and should obtain an order that the plaintiff pay the costs of the proceeding, the order will be effectively unenforceable because of the bankruptcy. The rationale behind s 60(2) and 60(3) is therefore, at least in part, to protect those whom the bankrupt has been suing. Such protection would be lost if the word 'action' in s 60 were to be construed as excluding a proceeding in which the bankrupt has sued as a trustee for someone else.

4 *In my view, s 60 has been enacted deliberately as a broad provision, so as to encompass any proceeding brought by a bankrupt before bankruptcy. The exceptions have been expressed quite narrowly. The intention is that, once a bankruptcy occurs, no further costs should be incurred in a proceeding unless the trustee in bankruptcy makes an election to continue the proceeding. If such an election is made, the trustee in bankruptcy will ordinarily become substituted as plaintiff in the pending proceeding, in the capacity of trustee in bankruptcy for the former plaintiff. The trustee in bankruptcy will thereby become liable for the costs of the proceeding in the event that it is unsuccessful and a costs order is made in favour of the defendant in the proceeding or some other party to it. The trustee in bankruptcy may be entitled to an indemnity in respect of those costs out of the bankrupt estate, as expenses of the administration of the estate, to the extent to which the estate has assets. The trustee in bankruptcy will obviously consider whether continuing to prosecute the proceeding will be likely to have any benefit to the estate of the bankrupt, and therefore to the bankrupt's creditors. One of the elements that the trustee in bankruptcy will take into account is whether the bankrupt is suing in a personal capacity or some other capacity, particularly that of trustee for someone else. If the bankrupt has sued as trustee for another person, and the estate will not benefit, the trustee in bankruptcy would no doubt usually elect not to continue to prosecute the proceeding. This would protect any defendant, and perhaps other parties to the proceeding, with respect to costs. Of course, it may impact on the beneficiary of the trust of which the bankrupt claims to be trustee. The beneficiary may be forced to institute proceedings in his or her own right to enforce the trustee's legal right, as can be done where there are 'exceptional circumstances'. See* Lamru Pty Ltd v Kation Pty Ltd *(1998) 44 NSWLR 432.*"[124]

118. In *Owens v Comlaw*[125] (*Owens*), the Victorian Court of Appeal considered whether Ms Owens' trustee had power under s 60(2) to elect to prosecute an appeal she had commenced before her bankruptcy. Ms Owens, who was a solicitor, sought to challenge a declaration made by Nettle J concerning the terms of a retainer between her and Comlaw as well as the costs orders made at trial. If the trustee was empowered to make the election, the Court was also asked to consider whether the trustee was also entitled to seek leave to discontinue it.

119. Ashley JA, with whom Redlich JA agreed, decided that s 60(2) applied to Ms Owens' appeal. Therefore, her trustee was entitled to elect to continue her appeal. His Honour said in part:

[124] [2001] FCA 25; (2001) FCR 151 at [18]-[20]; 157-158

[125] [2006] VSCA 151; (2006) 201 FLR 275; Ashley and Redlich JJ

"…

4) The question whether an action is one to which s.60(2) applies, assuming that it fits the description in sub.s.(5), and is not excluded by operation of sub.s. (4), is not necessarily dependent upon the action or its subject matter being 'property' which vested in the trustee under s.58(1). There may nonetheless be such a connection between the action and the estate as to make s. 60(2) applicable. This case is an illustration of such a connection.

(5) Thus, one could expect that a consequence of a successful appeal would be that the quantum of professional costs recoverable by Ms Owens from the respondents would be the greater. That could be expected to bear upon the quantum of required contributions, and in turn bear upon the size of the estate divisible amongst creditors.

(6) Again, a likely consequence of a successful appeal would be that the costs order made against Ms Owens at first instance would be reversed. Such an outcome would benefit the estate – at least by reducing the quantum of claims provable against it.

7) Further, the success of the appeal might have favourable implications for the quantum of disbursements recoverable from the respondents. Disbursements, when recovered, should probably be described as after-acquired property. But whether or not that be so, the larger the amount of recoverable disbursements, the better for Ms Owens' creditors.

(8) All in all, even if none of the favourable consequences of a successful appeal should be characterised as 'property', it is evident that successful prosecution of the appeal would be likely to have favourable consequences for creditors – I except the respondents. That shows a connection between the action and the estate which, in my opinion, is quite sufficient to give s. 60(2) application.

(9) The nature of the action is not one which could call s. 60(4) into play."[126]

120. In *Stankovic*, Beazley JA considered whether Mr Stankovic was entitled to appear on the hearing of an appeal lodged by the Baulkham Hills Shire Council (Council) before a sequestration order was made against him. That order had been made on the petition of the Council upon the non-payment of a costs order made against Mr Stankovic. The costs order had been made by the Land and Environment Court (LEC) when it decided that Mr Stankovic and his wife were using certain premises as a junkyard contrary to s 76B of the *Environmental Planning and Assessment Act 1979* (NSW). It made orders that Mr Stankovic take certain steps with regard to the goods stored on the property. The Council then alleged that Mr and Mrs Stankovic had not complied with those orders and, by notice of motion in the LEC, sought orders permitting it to enter the property and remove goods, sell or dispose of it and requiring Mr Stankovic to pay its costs and expenses. The LEC refused to make the orders and the Council lodged an appeal.

121. Mr Stankovic's interest in the land and in most of the property that was on the land and that was at the centre of the proceedings in the LEC was now vested in his trustee. As the Council, and not Mr Stankovic, instituted the appeal, s 60(2) did not apply. It only applies to

[126] [2006] VSCA 151; (2006) 201 FLR 275 at [42]; 285-286

an action commenced by the person who subsequently becomes bankrupt. The Council submitted that Mr Stankovic had no interest in the proceedings because he had no interest in the land and goods that are their subject. As he had no interest, he had no right to appear on the hearing.

122. Beazley JA decided that the subject matter of the Council's appeal was not the land and goods but enforcement of its earlier orders. Therefore, it could not be said that Mr Stankovic's property, which was now vested in his trustee, was the subject matter of the proceedings. Mr Stankovic had an interest in the proceedings and was the proper contradictor to the Council's contention that it could enforce orders made by the LEC personally against him.

Is there consistency between the cases considering actions commenced before bankruptcy and those sought to be commenced after bankruptcy?

123. It seems to me that, with the exception of *Lofthouse*, the courts have applied consistent principles regardless of whether the case before them concerned a proceeding commenced before bankruptcy or a proceeding commenced after it. The principles are those set out by the High Court in *Cummings*. The only thing that differs is the manner in which the outcome of the application of the principles is expressed. If the matter concerns an action that a bankrupt wishes to commence after bankruptcy, the issue is addressed in terms of his or her standing and so in terms of whether he or she has a sufficient interest in the matter to bring those proceedings. If the proceedings have already been commenced when a person becomes bankrupt, the matter is considered under s 60(2) of the Bankruptcy Act.

124. In *Cummings*, the majority said that it is a fundamental law of bankruptcy that a bankrupt is divested of his interest in his property and his liability for his provable debts. Therefore, it took a more circumscribed view of the word "*property*" in s 5(1) of the Bankruptcy Act than was taken in a case such as *Lofthouse*. That more circumscribed view meant that a right of appeal was not property within the meaning of s 5(1). It meant that whether a bankrupt was entitled to commence proceedings became a question of standing and so of whether he or she had sufficient interest in the matter to do so. It was not a question of whether property had been vested in the trustee under s 58(1).

125. The judgment in *Griffiths* pre-dates *Cummings*. The majority both looked for any effect that Mr Griffiths' appeal might have on the property that vested in his trustee. His pilot's licence was not property and an appeal under s 44(1) of the AAT Act was not property. The principles that they applied are consistent with those later applied in *Cummings*.

10

11 126. That led to its coming to a view that there was not a blanket prohibition on a bankrupt's commencing proceedings. Whether there was a prohibition in particular circumstances was determined by whether the bankrupt had, or did not have standing to commence the proceedings. Whether a bankrupt did depended on whether he or she had an interest in the subject matter of the proceedings. Where the bankrupt could only demonstrate an interest in a matter creating or evidencing a provable debt, he or she could not demonstrate an interest for, by virtue of the operation of the Bankruptcy Act, he or she had none. He or she was divested of any interest in his or her property and his or her liability for his provable debts.

12

13 127. In *Owens*, Ashley and Redlich JJA started from the same premiss by looking for a "*connection*" between the action that Ms Owens had commenced before her bankruptcy and her estate. The possible beneficial or detrimental effects for her estate that would flow from a successful or unsuccessful result if the action were continued were irrelevant; only the connection. Having found the connection that was enough to bring the proceeding within the scope of s 60(2). The result was to stay the proceeding and to leave the decision whether it was to be continued in the hands of Ms Owens' trustee.

14

15 128. The same principles underpin the approach taken by Beazley JA in *Stankovic*. Section 60(2) was not relevant for Mr Stankovic was the respondent to the Council's appeal and not the person commencing any action. Her Honour looked for a connection between an action concerning the enforcement of orders made against Mr Stankovic and requiring him to take certain steps and property that was divisible among his creditors – and so his estate for the purposes of bankruptcy. She found none and so found that he was entitled to appear on the Council's appeal.

16

17 129. *Randall* also looked to the connection between the action brought by Mr Randall and the property that vested in his trustee. As earnings could not be part of that property, the connection could not be made and Mr Randall had standing to commence and continue the action.

130. Regretfully, I am unable to find a consistency between the approach taken in *Cummings*, *Griffiths*, *Owens*, *Stankovic* and *Randall* on the one hand and *Lofthouse* on the other. *Lofthouse* did not look for a connection between the action that had been commenced by Mr Guss, as trustee for his daughters, before his bankruptcy and his estate. Instead, it assumed that, through the operation of ss 58(2) and 60, bankruptcy divests the bankrupt of all property (broadly defined to include actions and appeals) and of all interests (including those in matters in which, as a trustee for others, the bankrupt can have no interest

affecting his or her estate or provable debts) and protects those whom the bankrupt has been suing and the estate from further costs.

131. The judgment in *Lofthouse* did not explain why an action at first instance, as opposed to an appeal of the sort considered in *Cummings*, would be property for the purposes of ss 5(1) and 58(1). Its assumption that the trustee in bankruptcy would usually elect not to continue to prosecute a proceeding that did not benefit the estate seems to me to be contrary to the proposition in *Cummings* that a "*… bankrupt is divested of both his interest in his property and liability for his provable debts*" but only in so far as it relates to divisible property and those provable debts. A bankrupt is not divested of his or her interest in everything or relieved of his or her liability for everything. If a bankrupt's property is not property within the meaning of s 5(1), it does not vest in the trustee under s 58(1) but remains that of the bankrupt. If a bankrupt has debts that are not provable debts, he or she is not relieved of liability for them.

132. Finally, the judgment in *Lofthouse* did not explain why the Bankruptcy Act can be used to protect those who are being, or might be, the defendant to an action by the bankrupt. This was a matter addressed by Cooper J in the earlier case of *Griffiths* in the context of a bankrupt's meeting an adverse costs order. He had said that Mr Griffiths' appeal could not expose his estate to an adverse costs order because it would arise after the date of the sequestration order and so not be a provable debt.

133. In expressing my difficulties, I note that *Lofthouse* has been adopted and applied by the Federal Court in subsequent cases. These include *McKellar v Container Terminal Management Services Ltd (No 4)*[127] (*McKellar*) in which Weinberg J cited it as authority for the proposition that where one of several applicants is made bankrupt, the effect of s 60(2) is to stay the entire action and not simply the claims brought by the bankrupt.[128] They also include *Baker v Sheridan & Anor*[129] in which Mason P cited it in relation to the manner in which a trustee makes an election. *Owens* set out [19] and half of [20] from the judgment in *Lofthouse* but made no comment regarding the conclusion in [18] that all rights of action vest in the trustee.

Authorities relating to proceedings in the Tribunal

[127] [2002] FCA 185, Weinberg J
[128] [2002] FCA 185 at [22]
[129] [2005] NSWCA 408

134. *Case X18*[130] was decided long before *Cummings* and others, to which I have referred. At the time, a taxpayer had to ask the Commissioner to forward his objection decisions to the Tribunal for review. When he made his request of the Commissioner, X18 was not a bankrupt but he was by the time the referral was made to the Tribunal. Senior Member Roach considered the matter by reference ss 60(2) and (3) and to the definition of the word "*action*" in s 60(5) concluding:

> " *I am of the opinion that the term 'action', defined in the* Bankruptcy Act *to mean 'any civil proceeding', is a term appropriate to identify proceedings before this Tribunal constituted in consequence of a competent request for reference to an independent review by this Tribunal. That being so, it will be subject to the provisions of subsec. 60(2) and (3) of the* Bankruptcy Act*, unless it falls to be characterised as an action within the meaning of subsec. 60(4) of that Act. In my view, it is not to be so characterised. …*
>
> *It follows that the right to conduct these proceedings passed to the trustee in bankruptcy. With that passed the right to bring those proceedings to a conclusion …*"[131]

135. I note that Senior Member Roach did not take into account the fact that the "*action*" in the Tribunal had not been commenced when the sequestration order was made against X18 and that s 60(2) applies only to actions that have been commenced. Whether s 60(2) had any application or whether the issue should have been decided on that basis of whether X had standing to lodge an application in the Tribunal depends on whether the proceedings commenced with his request to the Commissioner or with the Commissioner's referral to the Tribunal. I do not need to decide that.

136. In *Case 2/94*,[132] Senior Member Fayle considered whether a taxpayer had standing to seek review of a decision not to extend time to object to the Commissioner's decision. He applied for review on the day after a sequestration order was made against his estate. Again, it would seem that s 60(2) could not apply to the matter but Senior Member Fayle thought otherwise. He considered whether the application for review was an action within the meaning of s 60(2) of the Bankruptcy Act. His consideration took him to the traditional distinctions between civil proceedings and criminal proceedings and civil law and administrative law. He found that proceedings in the Tribunal are concerned with administrative law and so was not an "*action*" as contemplated by s 60(5) of the Bankruptcy Act.

137. On behalf of the taxpayer, Mr Hannan had submitted that the right to object against a decision is a personal decision and not property vested in the trustee under s 58(1). The

[130] (1990) 90 ATC 219

[131] (1990) 90 ATC 219 at 223

[132] (1994) 94 ATC 106

right to seek administrative review relates not to property but to liability. To eliminate liability would be to reduce the amount of the debts owed but have no impact on the property available for distribution. Senior Member Fayle decided that the taxpayer was not precluded from proceeding to administrative review by s 58. It would seem that he has based his decision on his understanding that proceedings in the Tribunal take place under a branch of the law – administrative law – that is exclusive of the civil law.

138. Both *Case X18* and *Case 2/94* were considered by Deputy President McDonald in *Re A and Commissioner of Taxation*[133] together with *Fuller* and *Griffiths. Cummings* had yet to be decided. The taxpayer had become bankrupt after he had lodged an application in the Tribunal. After summarising the cases and describing the Tribunal's role in reviewing a decision on its merits Deputy President McDonald concluded:

> "*… the tribunal may take the view that, on the material before it, it is satisfied that the correct or preferred decision is different to the original decision and that the difference may result in a finding less favourable to an applicant. If that was to occur, then it may result in the estate of a bankrupt being placed in a worse position than if the review had not been carried out. As a general matter of policy, the trustee in bankruptcy would clearly have an interest in any such appeal just as he would if an applicant was to succeed and receive a benefit.*
>
> *It seems to the tribunal that in those circumstances a right of appeal to the tribunal does amount to a proprietary right which vests in the trustee. Accordingly, in the case such as this where the trustee declines to participate in the continuation of the appeal, the tribunal should regard the appeal as being under the provisions of s 42A(1B) of the AAT Act.*
>
> *For that reason, the applications should be dismissed.*"[134]

139. It would seem that Deputy President McDonald's attention had not been drawn to the High Court's judgment in *Cummings* given a year before he gave his decision. Therefore, he relied, in part, on *Fuller* and did not address how a right to apply to the Tribunal for review of an administrative decision could be a proprietary right vesting in the trustee under s 58(1) but, as decided by the High Court, an appeal to the Full Court of the Federal Court could not.

[133] (1997) 46 ALD 715

[134] (1997) 46 ALD 715 at 717. The reference to s 42A(1B) of the AAT Act is a reference to the fact that, under that section, the Tribunal is taken to have dismissed an application without proceeding to a review if a notification is given to it under s 42A(1A). Section 42A(1A) provides that "*A person who has made an application to the Tribunal for a review of a decision may, in writing lodged with the Tribunal, at any time notify the Tribunal to the effect that the application is discontinued or withdrawn.*" Regretfully, I do not agree that the trustee' notice to discontinue the application can be given under s 42A(1A). As Spender J said in *Griffiths* of s 44(1) of the AAT Act, the terms of s 42A(1A) "*…would seem to preclude the trustee from …*"taking action under either of them. Section 44(1) provides that "*a party to the proceeding before the Tribunal may appeal to the Federal Court of Australia*" Section 42A(1A) permits the "*person who has made the application*"to withdraw or discontinue it. In neither case, does it permit the trustee to take that action. It seems to me that the trustee' power to discontinue the proceeding comes from s 60(2). If the trustee does nothing after being served a notice under s 60(3), discontinuance comes about by operation of that provision. Though stayed, the application would remain on foot in the Tribunal.

140. In *Secretary, Department of Social Security v Southcott*[135] (*Southcott*), North J considered the effect of Mr Southcott's bankruptcy on the recovery of unemployment benefits paid to him. Mr Southcott had applied to the Tribunal for review of the Secretary's decision to raise and recover the overpayments shortly before he became bankrupt. The Secretary's decision was made under s 1224 of the Social Security Act which provides:

> "*If:*
>
> *(a) an amount has been paid to a recipient by way of social security payment; and*
>
> *(b) the amount was paid because the recipient or another person:*
>
> *(i) made a false statement or a false representation; or*
>
> *(ii) failed or omitted to comply with a provision of this Act or the 1947 Act;*
>
> *the amount so paid is a debt due by the recipient to the Commonwealth."*

141. A debt due under s 1224(2) is recoverable by the Commonwealth by means of deductions from any ongoing social security payment received by the person or from another's if s 1234A applies, through legal proceedings and by means of a garnishee notice.[136]

142. Section 1237AAD provides that the Secretary may waive the right to recover all or part of a debt if satisfied that:

> **"***The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:*
>
> *(a) the debt did not result wholly or partly from the debtor or another person knowingly:*
>
> *(i) making a false statement or a false representation; or*
>
> *(ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and*
>
> *(b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and*
>
> *(c) it is more appropriate to waive than to write off the debt or part of the debt.*"

[135] [1998] FCA 323; (1998) 82 FCR 100; 50 ALD 162

[136] Social Security Act, s 1234(2)

143. North J considered that these provisions "*…suggest that the statutory debt is subject to the usual consequences of bankruptcy*."[137] The terms of s 1224(1) show that:

> "… *The availability of the methods of recovery are thereby limited to a time when there is a debt due to the Commonwealth. If the recipient of the overpayment has become bankrupt, the debt due to the Commonwealth is replaced by the right of the Commonwealth to prove in the bankruptcy and none of the means of recovery provided in s 1224(2) are available. Thus, s 1224(2) does not allow the Secretary to give a garnishee notice during the bankruptcy of the recipient of the overpayment.*"[138]

144. North J drew a distinction between the case he had to consider and that considered by Lockhart J, with whom Wilcox J agreed, in *Taylor v Secretary to the Department of Social Security*[139] (*Taylor*). That case considered the predecessor of ss 1224(1) and (2)(a) of the Social Security Act: s 181. That section provided:

> "*(1) Where, in consequence of a false statement or representation, or in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of pension, allowance or benefit under this Act which would not have been paid but for the false statement or representation, failure or omission, the amount so paid is a debt due to the Commonwealth.*
>
> *(2) Notwithstanding anything contained in this Act, where -*
>
> *(a) an amount has been paid by way of pension, benefit or allowance under this Act that should not have been paid;*
>
> *(b) an amount has been paid by way of pension or allowance under the* Veterans' Entitlements Act 1986 *or the* Seamen's War Pensions and Allowances Act 1940 *that should not have been paid; or*
>
> *(c) an amount has been paid to a person under a prescribed educational scheme that should not have been paid, being an amount paid during a period during which the person was in receipt of a prescribed pension (other than a pension under the* Veterans' Entitlements Act 1986*),*
>
> *and the person to whom that amount was paid is receiving, or is entitled to receive, a pension, benefit or allowance under this Act (other than a funeral benefit under Part VIII), that amount (including any amount payable by the person under subsection (3)) shall, unless the Secretary takes action under subsection 186(1) in relation to that amount, be deducted from that last-mentioned pension, benefit or allowance by reducing each payment of that pension, benefit or allowance by a proportion of that pension, benefit or allowance, being a proportion decided by the Secretary in each particular case, until the sum of the amounts by which the payments are reduced equals that amount.*"

145. His Honour referred to the consequences of bankruptcy on the statutory debt referred to in s 181(1) as follows:

[137] [1998] FCA 323; (1998) 82 FCR 100; 50 ALD 162 at 105; 166

[138] [1998] FCA 323; (1998) 82 FCR 100; 50 ALD 162 at 107; 167-168

[139] (1988) 18 FCR 322; 79 ALR 327; 14 ALD 655

> " *Section 181(1) either acknowledges or creates a debt (it does not matter which for present purposes) due to the Commonwealth where overpayments of pensions, benefits or allowances under the* Social Security Act *have been made in consequence of a false statement or representation or failure or omission to comply with that Act and would not otherwise have been made. The debt is enforceable at law against the recipient of the overpayment and, upon his or her becoming bankrupt, may be proved in the bankruptcy. The Commonwealth is generally in the same position with respect to its provable debts as any other creditor since the* Bankruptcy Act 1966 *binds the Crown in right of the Commonwealth (s 8).*
>
> *The intervention of bankruptcy converts a creditor's right of action against the debtor to a right to prove and share in the distribution of his estate then vested in the trustee. During a bankruptcy a creditor is no longer able to maintain an action for a debt or otherwise enforce remedies against the person or property of the bankrupt which may affect his estate:* Ex parte: Trustee of Property of Cork; Blackburn *(1932) 5 ABC 1 at 6-7;* Re Higginson & Dean; Ex parte The Attorney-General *[1899] 1 QB 325 at 333;* Clyne v Deputy Commissioner of Taxation (Cth) *[1984] HCA 44; (1984) 154 CLR 589 at 594-595;* Re Weiss; Ex parte Official Trustee in Bankruptcy *[1985] FCA 283; (1985) 7 FCR 121 at 123-124;* Knight v Deputy Federal Commissioner of Taxation *(1987) 87 ATC 4970 per Burchett J at 4971-4972. The right to sue is replaced by a right to share with other proved creditors equally and proportionately in the distribution of the estate of the bankrupt: see* Re Thomas; Ex parte The Commissioners of Woods and Forests *(1888) 21 QBD 380 at 383 and* Re White *(1960) 20 ABC 11; [1961] ALR 331.*
>
> *Bankruptcy does not extinguish the debt. The creditor's right to sue may be revived if, for example, the bankruptcy is annulled. If a bankruptcy takes its usual course and the bankrupt is subsequently discharged from bankruptcy, he is released from all provable debts (s 153 of the* Bankruptcy Act*), though the assets constituting his divisible property remain in the hands of the trustee available for distribution among the proved creditors.*
>
> *The overpayments by the Commonwealth to the applicant constitute a debt which upon her bankruptcy became a provable debt, thus converting the right of the Commonwealth to sue into a right to prove and share in her estate.*"[140]

. Bankruptcy and taxation debts were considered by the Federal Court in *Robertson v Deputy Commissioner of Taxation*[141] (*Robertson*) and *Spirakos v Deputy Federal Commissioner of Taxation*[142] (*Spirakos*). In *Robertson*, the taxpayer had lodged applications to review the Commissioner's objection decisions before he presented a debtor's petition. A trustee in bankruptcy was immediately appointed and, three months later, he wrote to the Tribunal advising that he did not intend to pursue the applications for review in his capacity as bankruptcy trustee. The trustee then wrote to Mr Robertson purporting to assign the review rights to him. Mr Robertson asked the Tribunal to continue with the applications but it decided that he had lost his standing on his bankruptcy.

[140] (1988) 18 FCR 322; 79 ALR 327; 14 ALD 655 at 330-331; 335-336; 663-664

[141] [2003] FCA 944; (2003) 2003 ATC 4878; Carr J (Appeal dismissed *Robertson v Deputy Commissioner of Taxation* [2004] FCAFC 46; (2004) 137 FCR 513; 55 ATR 106; [2004] ATC 4209; Spender, Branson and Stone JJ)

[142] [2005] FCA 1068; (2005) 2005 ATC 4826; North J

146. On appeal, Carr J considered *McCallum* and *Cummings* and decided that both identified the same reason for a bankrupt's losing standing. The reason was that the debt concerned is payable solely out of the bankrupt's estate and is no longer otherwise recoverable from the debtor. It makes no difference that success in an appeal or in a review might result in a surplus.[143] On his discharge from bankruptcy, Mr Robertson would be released from liability for all of the provable debts in his bankruptcy as his circumstances did not take him within any of the exceptions. That meant that no part of the tax debt to which he was liable at the commencement of his bankruptcy would be capable of being allocated to a Running Balance Account of debts maintained by the Commissioner. Mr Robertson did not have standing to proceed with the applications in the Tribunal.

147. Unlike Mr Robertson, Mr Spirakos did not apply to the Tribunal for review of the Commissioner's objection decision before he was made bankrupt even though the objection decision had been made before that time. Mr Spirakos applied to the Tribunal for an extension of time within which to lodge an application but the Tribunal decided that it did not have jurisdiction because he had no standing to make the application. North J decided that the Tribunal was correct in *Spirakos*. He relied on *Cummings*, *McCallum* and the judgment of the Full Court of the Federal Court on appeal from that of Carr J in *Robertson*.[144]

148. The final case I will consider is that of *Re Cook and Secretary, Department of Employment and Workplace Relations*[145] (*Cook*). Although it is not stated in the reasons, Mr Cook lodged his application in the Tribunal for review of the Secretary's decision on 17 November 2005 and so before he became bankrupt on 20 January 2006. The decisions were to raise and recover amounts of disability support pension (DSP) paid to Mr Cook because he had failed to inform Centrelink of income received by his de facto spouse.

149. Generally, a bankrupt is divested of any interest in property and liability for provable debts. The Secretary contended, however, that Mr Cook would not be divested of liability for his provable debts. As his overpayments resulted from his fraud, s 153 of the Bankruptcy Act will not operate to release him from the balance of his debt remaining after he is discharged from bankruptcy. Deputy President Hack SC did not accept this contention for a decision that Mr Cook continues to have any liability after his discharge from bankruptcy must be made at that stage. Mr Cook may apply for its review at that time, he said.[146]

[143] [2005] FCA 1068; (2005) 2005 ATC 4826 at [23]; 4,882

[144] *Robertson v Deputy Commissioner of Taxation* [2004] FCAFC 46; (2004) 137 FCR 513; 55 ATR 106; [2004] ATC 4209; Spender, Branson and Stone JJ

[145] [2007] AATA 1690

[146] [2007] AATA 1690 at [13]

150. Deputy President Hack said that standing was the first issue he had to consider and put it this way:

> " *Given the bankruptcy, the first issue is whether Mr Cook has standing to prosecute these proceedings. There is considerable binding authority for the proposition that upon bankruptcy an applicant in this Tribunal will generally be unable to be described as a person 'dissatisfied' with an objection decision of the Commissioner of Taxation and thus will lack standing to prosecute an application for a review of that decision*[147]*. Those decisions are based upon the language of s 14ZZ of the* Taxation Administration Act 1953 *(Cth.), which confers the right to seek a review of an objection decision upon a person dissatisfied with the Commissioner's objection decision. The gravamen of the decisions appears from the judgement of Whitlam J in* McCallum …:
>
> > *'The fundamental principle embodied in the* Bankruptcy Act *must also affect the applicant's right to apply to the Tribunal for review of the respondent's objection decision, since the applicant is no longer liable for the taxation debt. His locus standi cannot depend upon whether, under par 14ZZ(a) of the* Administration Act*, he "applies" to the Tribunal or "appeals" to the Court. Such a distinction would not be logical. In either case he can have no interest to minimize his liabilities. The trustee, on the other hand, plainly does have such an interest. (Section 177 of the Assessment Act affects the trustee to the same extent as the bankrupt.) Whatever may be the correct characterisation of a taxation objection for the purposes of s 134(1)(j) of the* Bankruptcy Act *(a question which was not argued in the present appeal), I agree with Lehane J for the reasons he gives that a review of an objection decision under Pt IVC of the Administration Act is a "legal proceeding" that the trustee is empowered to institute.'"*[148]

151. By posing the issue in terms of standing, and relying on the cases of *McCallum* and the Full Court's judgment in *Robertson v Commissioner of Taxation*, it seems to me that Deputy President Hack overlooked the fact that there was a very important distinction that had to be drawn between the facts of his case and those in *McCallum* and *Robertson*. In *Cook*, Mr Cook was not bankrupt when he lodged his application but both Mr McCallum and Mr Robertson were bankrupt when they lodged, or purported to lodge their applications. Therefore, their entitlement to apply for review of the Commissioner's objection decision was the relevant issue. It could not be the relevant issue to consider in Mr Cook's case. He had interests affected by the decision raising and recovering an overpayment of DSP when he lodged his application in the Tribunal. When he subsequently became bankrupt, s 60(2) applied and the status of his application had to be decided under that section. Standing to make the application could not be in issue. If s 60(2) applied, its only effect was to stay the action; not to conclude it. It would only be concluded if the trustee decided that it would be discontinued or withdrawn. Even if it were decided that Mr Cook had ceased to be a person whose interests were affected by the decision to raise and recover

[147] "*McCallum v Commissioner of Taxation* (1997) 75 FCR 458; *Robertson v Commissioner of Taxation* (2004) 137 FCR 513."

[148] [2007] AATA 1690 at [7]

the overpayment of DSP, it is by no means clear that the Tribunal may have regard to that. The judgment of the Full Court of the Federal Court in *Transurban City Link Ltd v Allan* [149] and that of the High Court on appeal in *Allan v Transurban City Link Ltd* [150] do not decide whether standing is determined only at the time an application is lodged. They leave the question open but the Federal Court makes it clear that, if Mr Allan's interest had been lost, it might have been open to the Tribunal to dismiss the application under s 42B of the AAT Act on the basis it was frivolous or vexatious.

152. Returning to *Cook*, I note that Deputy President Hack said that, as matters stood at the time, Mr Cook had no interest in the debt raised by the Secretary or in the possibility of any waiver of it. He expressed his reason for reaching that conclusion:

> " *The present proceedings are not excluded from the operation of s 60(2) of the* Bankruptcy Act *by s 60(4) of that Act because they are not proceedings in respect of any personal injury or wrong done to Mr Cook. But the nature of the issue in these proceedings is such that there is a close connection between the proceedings and*
> *Mr Cook's estate. The essential questions that arise in these proceedings are whether there is a debt owed by Mr Cook, the amount of that debt, and whether it ought to be waived. Were I to conclude that there was no debt, the trustee in Mr Cook's bankruptcy would be entitled to receive any refund on behalf of the estate. The proceedings are intimately concerned with Mr Cook's debts, property, and his estate. Thus, in my view, the present proceedings are caught by s 60(2) of the Bankruptcy Act so long as the proceedings can be described as an 'action'."*[151]

153. I have struggled to reconcile Deputy President Hack's conclusion in this paragraph with the approach taken by North J in *Southcott*. His Honour's approach would require an examination of the essential character of the refund before a conclusion could be drawn that it would be paid to the trustee if the Tribunal were to be in a position to review the decision. Deputy President Hack does not appear to have done that. When it is done, the conclusion must be reached that the essential character of the refund would have been a payment or payments of DSP. That would have followed from the fact that, in the circumstances described in the reasons for decision, a decision favourable to Mr Cook could only have been made if the Tribunal found that the DSP was not paid to him as a result of a false statement or misrepresentation as to his partner's income.[152] Once the payment was found not to have been paid on that basis, it followed that the criteria in s 1223(1) would not have been satisfied and a debt would not have arisen. Once any amount of payment of DSP was not a debt, it had to resume its essential character as a

[149] [1999] FCA 1723; (1999) 95 FCR 553; 168 ALR 687; 57 ALD 583; 105 LGERA 427; 30 AAR 304; Black CJ, Hill, Sundberg, Marshall and Kenny JJ

[150] [2001] HCA 58; 208 CLR 167; 75 ALJR 1551; 183 ALR 380

[151] [2007] AATA 1690 at [24]

[152] Social Security Act, s 1223(1) and (1AB)(d). This provision is equivalent to s 1224 considered in *Southcott* but it has since been repealed and s 1223 enacted: No. 47 of 2001, s 3, Schedule, items 10 and 17.

payment of DSP. As a social security pension, a DSP is a social security payment. Therefore, it is inalienable by virtue of s 60(1) of the SSA Act and does not come within any of the modifications to that principle in s 60(2).

154. Deputy President Hack went on to conclude that the proceedings in the Tribunal were an "*action*" within the meaning of s 60(5) because the word "*civil*" has been used in contradistinction to "*criminal*" proceedings and so encompasses administrative proceedings of the sort considered in the Tribunal. This is consistent with the conclusions reached by the Federal Court in *McCallum* and *Robertson*.

155. Deputy President Hack dismissed the proceedings under s 42A(4) of the AAT Act but I have had difficulty in understanding his reason for doing so. He has not stated a reason. Section 42A(4) provides:

> "*If:*
>
> *(a) a person makes an application to the Tribunal for a review of a decision; and*
>
> *(b) the person is unable to show, within such time as is prescribed after being notified in writing by the Registrar or a Deputy Registrar that the decision does not appear to be reviewable by the Tribunal, that the decision is so reviewable;*
>
> *the Tribunal may dismiss the application without proceeding to review the decision.*"

156. The section separates the application from the decision that it seeks to review. It assumes that the application is properly made and so properly made by a person whose interests are affected by the decision within the meaning of s 27 and focuses on whether that decision is reviewable. The decision of which Mr Cook sought review was a decision to raise and recover an amount of DSP said to have been overpaid to him. At the time he lodged his application, his interests were affected by the decision. The decision of which he sought review was clearly reviewable by the Tribunal. Therefore, the Tribunal did not have power to dismiss the application under s 42A(4) of the AAT Act.

Principles to be drawn from the authorities

157. It seems to me that the authorities require me to ask myself the following questions and apply the following principles when considering the effect of a person's bankruptcy on an application that person has previously lodged in the Tribunal or on an application that person wishes to make:

(1) Determine the date on which the person became bankrupt.

(2) Determine whether or not the person has an existing application in the Tribunal for review of a decision on that date.

(3) If the person **has an existing application** for review on the day of bankruptcy:

(a) in general terms, an application in the Tribunal for review of a decision is a "*civil proceeding … at law*" within the meaning of s 60(5) and so an "*action*" for the purposes of s 60(2) of the Bankruptcy Act in the same way that an appeal to the Federal Court from the Tribunal's decision on that application is an action;[153]

(b) decide whether the application is an action of the sort that is stayed by the person's bankruptcy:[154]

(i) it will **not** be stayed if it is an action in respect of compensation payments of the type payable under the *Safety, Rehabilitation and Compensation Act 1988*;[155]

(ii) it will be stayed if there is a connection between the application for review and the person's bankrupt estate;

(iii) the connection exists if the subject matter of the application may affect the property divisible among the creditors or the amount of provable debts;[156]

(iv) examples of circumstances in which the connection does **not** exist arise if the application for review concerns:

· an entitlement or licence to undertake an activity;[157]

· an entitlement to payment of an amount, such as a social security payment, that is inalienable and cannot form part of a bankrupt's divisible property;

· the amount sought to be recovered is not a provable debt e.g. certain student loans under *Student Assistance Act* 1973;

(v) examples of circumstances in which the connection **does** exist arise if the application for review concerns:

· a decision to recover an amount that is a provable debt in the bankruptcy e.g. tax debts and overpayments of many, but not all, amounts paid under social security legislation;

· would affect the amount of property vested in the trustee under s 58(1) and divisible among creditors;

(c) if the application for review is not stayed under s 60 of the Bankruptcy Act, it proceeds in the normal way;[158]

(δ) if the application for review is stayed, decide how to deal with it:

(ι) notify the trustee of the application;

[153] *McCallum* (1997) 75 FCR 458; 145 ALR 446; 36 ATR 256 at 474 per Lehane J with whom Whitlam J agreed.

[154] It is clear from authorities such as *Cummings* and *Griffiths* and those subsequently applying them that not every action is stayed by s 60(2).

[155] Actions commenced before bankruptcy in respect of any personal injury may be continued by the bankrupt: Bankruptcy Act, s 60(4).

[156] *Owens* and *Stankovic* which are decided on a basis consistent with that adopted by the majority in the High Court in *Cummings* in deciding whether a person has standing to commence an application after bankruptcy.

[157] *Griffiths*

[158] With one exception, the Tribunal is not a jurisdiction in which costs are awarded against an applicant and so considerations regarding security of costs are irrelevant. The exception relates to the costs of a claimant in proceedings instituted by the Commonwealth under the *Safety, Rehabilitation and Compensation Act 1988*: s 67(8A). It is irrelevant in this context.

(ii) if the trustee elects:

- to proceed with the application, do so;
- to discontinue the application, dismiss the application under s 42B of the AAT Act;[159]

(4) If the person **does not have an existing application** for review on the day of bankruptcy but seeks to lodge an application:[160]

(a) an application or a right to apply to the Tribunal for review of a decision is not property within the meaning of s 5(1) of the Bankruptcy Act and so does not vest in the bankrupt's trustee under s 58(1);

[159] Section 42B provides that the Tribunal may dismiss the application if it is satisfied that the application is frivolous or vexatious. As Gray J explained in *Pitt v OneSteel Reinforcing Pty Limited* [2008] FCA 923, "*the word 'rivolous' especially when coupled with 'exatious' is a technical legal term, in substance meaning the absence of a cause of action.*"(at [9]). Graham J explained in *JF Keir Pty Limited v Sparks* [2008] FCA 611 that "*An action can be stayed as vexatious 'f it can really lead to no possible good'*"(at [62]). The limits of such a power given to the courts were considered by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (N.S.W.)* [1964] HCA 69; (1964) 112 CLR 125; 38 ALJR 253 at [8]-[10]; 128-130; 254-255:
"*The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. …*[the] *cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action –if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal –is clearly demonstrated. The test to be applied has been variously expressed; "o obviously untenable that it cannot possibly succeed" "anifestly groundless" "o manifestly faulty that it does not admit of argument" "iscloses a case which the Court is satisfied cannot succeed" "nder no possibility can there be a good cause of action" "e manifest that to allow them"(the pleadings) "o stand would involve useless expense"*
…
…Dixon J. (as he then was) sums … number of authorities in Dey v Victorian Railways Commissioners [(1949) 78 CLR 62] *where he says: ' case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.' Although I can agree with Latham C.J. in the same case when he said that the defendant should be saved from the vexation of the continuance of useless and futile proceedings, in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff' claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.*"(at 128-129, footnotes omitted)
Principles of this sort underpin the Tribunal' exercise of the power given to it by s 42B(1) of the AAT Act. The Tribunal' reasons for decision in *Re Williams and Australian Electoral Commission and The Greens (party joined)* [1995] AATA 160; (1995) 38 ALD 366; 21 AAR 467 at [30]-[31]; 372; 473-474 set out the following general principles governing the exercise of the power:
"*(30) The power for peremptory dismissal of proceedings is to be exercised cautiously and sparingly: per Barwick CJ in* General Steel Industries Inc v Commissioner for Railways (NSW) *[1965] ALR 636; (1964) 112 CLR 125. The mere fact that a proceeding is shown to have no foundation in fact is insufficient to justify a finding that it was commenced vexatiously or without reasonable cause: Per von Doussa J in* Hatchett v Bowater Tutt Industries Pty Ltd (No 2) *(1991) 28 FCR 324.*
(31) The manifest untenability of a proceeding provides one ground for finding that the proceeding is a vexatious one. …"(at 372).
An application that has been stayed by operation of s 60(2) of the Bankruptcy Act and that the applicant' trustee has discontinued is an application in which the applicant cannot succeed. There might have been reasonable prospects of success when it was lodged but those prospects count for nought when s 60 of the Bankruptcy Act takes effect.
It is also feasible that the bankrupt could withdraw it under s 42A(1A) so that it is taken to have been dismissed by virtue of the operation of s 42(1B).

[160] I have not set out the principles as they would apply in the rare instance that the person is not the applicant to a proceeding in the Tribunal but a party joined e.g. if an application is made to the Tribunal by the Commonwealth or a Commonwealth authority under the *Safety, Rehabilitation and Compensation Act 1988*, the claimant for compensation is likely to be joined as a party whose interests are affected by the decision under review. It is clear from an authority such

(b) whether or not the person is entitled to lodge the application for review of a decision must be decided by reference to whether he or she is a person whose interests are affected by that decision[161] or, to use the language of the courts, whether he or she has standing;

(c) whether or not an applicant has interests affected by a decision is determined by reference to whether the application would affect the amount of property vested in the trustee and divisible among creditors or the amount of provable debts;

(i) examples of circumstances in which a person **does** have an interest and so **does** have standing to lodge an application arise if the application for review concerns:

· an entitlement or licence to undertake an activity;[162]

· an entitlement to payment of an amount, such as a social security payment, that is inalienable and cannot form part of a bankrupt's divisible property;

· the amount sought to be recovered is not a provable debt e.g. certain student loans under *Student Assistance Act* 1973;

(v) examples of circumstances in which a person does **not** have an interest and so does **not** have standing to lodge an application arise if the application for review concerns:

· a decision to recover an amount that is a provable debt in the bankruptcy e.g. tax debts and overpayments of many, but not all, amounts paid under social security legislation;

· would affect the amount of property vested in the trustee under s 58(1) and divisible among creditors;

(d) if the person has an interest, the application proceeds in the normal way;

(e) if the person does not have an interest, the Tribunal does not have jurisdiction to consider it and so may dismiss it on that basis.

(i) since the addition of s 69BA in the AAT Act,[163] the Tribunal may exercise its powers under s 42B to dismiss the application.[164]

I certify that the preceding one hundred and fifty seven (157) paragraphs are a true copy of the reasons for the decision herein of Deputy President S A Forgie

as *Stankovic* that principles relevant to an applicant' standing would be relevant in considering whether a bankrupt joined party may continue to take part in the proceeding as a joined party. Among the principles that would be relevant to bear in mind would be s 116(1)(g) of the Bankruptcy Act to the effect that any right to recover damages or compensation for personal injury is not property divisible among the creditors.

[161] AAT Act, s 27(1)

[162] *Griffiths*

[163] *Tribunals Amalgamation Act 2015*; s 3 and Schedule 1, Item 155

[164] See [155]-[156] and FN 159 above. Amended as indicated in [63] above and see also [84] above.

.....[sgd].....
Personal Assistant

Dated: 21 December 2020

Heard:	29 October and 7 December 2020
Counsel for the Applicant:	Dr B Orow Mr Phillip Dunn QC with Dr M Gumbleton
Solicitor for the Applicant:	Ms S Radovic C/- Radovic Lawyers
Counsel for the Respondent:	Ms C Horan
Solicitor for the Respondent:	Ms A Smyth Australian Taxation Office